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Supreme Court of the United States

No. ———.

October Term A. D. 1947.

SOY FOOD MILLS, INC.,

Petitioner,

vs.

PILLSBURY MILLS, INC.,

Respondent.

PETITION OF SOY FOOD MILLS, INC., FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your petitioner, Soy Food Mills, Inc., respectfully prays the grant of the Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit to review the judgment of that Court entered April 10, 1947. A transcript of the Record in the case, including the Proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with the Rules of this Court. Certain of Petitioner's exhibits which were presented to the Circuit Court of Appeals as physical exhibits and which are therefore not included in the Record have been forwarded under separate cover.

Summary and Short Statement

Petitioner brought this action in the District Court for the Northern District of Illinois, charging Respondent with unfair competition and copyright infringement in its use of trade marks and labels for soy pancake flour. Respondent counterclaimed and charged Petitioner with trade mark infringement, unfair competition and copyright infringement on the basis of an old trade mark and label which it had once used for ordinary pancake flour. Petitioner prevailed on its Complaint in the District Court, and Respondent's Counterclaim was dismissed. The Circuit Court of Appeals reversed in part and found neither party entitled to relief. The relevant facts follow.

Soy Food Mills, Inc., Petitioner, first introduced on the market in November, 1942, a prepared pancake mix which it sold under the trade mark GOLDEN SOY (R. 125-6). This product was packed in a blue and yellow carton of original design (R. 121-2, Plaintiff's Exhibit 7). The evidence clearly established that GOLDEN SOY was the first prepared pancake mix to be sold and merchandised extensively on the basis of a substantial content of soy flour (R. 279, 281-2). Admittedly, soy flour had been used previously as an ingredient in a pancake mix, but these uses were casual or sporadic and made no impression on the purchasing public (R. 279-285; 710-711). GOLDEN SOY enjoyed an immediate and substantial commercial success in the markets in which it was introduced (R. 129, 713). These markets comprised the principal metropolitan areas in the East and Middle Western sections of the country. Petitioner expended in excess of $200,000.00 in advertising GOLDEN SOY and its successor product GOLDEN Wheat-Soy MIX, during the years 1943 and 1944 up to the date of the trial in September (R. 132). In practically all of its

advertising it featured the slogan, "The Soy Bean Taste Sensation" (R. 132).

In February, 1943, Respondent, Pillsbury Mills, Inc., introduced Pillsbury's WHEAT-SOY-RICE, a soy pancake flour directly competitive to Petitioner's product, GOLDEN SOY, and not directly competitive with other pancake flours then being marketed by Pillsbury. This was the first pancake flour containing soy flour ever sold by Pillsbury (R. 345-6). WHEAT-SOY-RICE was packaged in a carton and under a label entirely dissimilar from GOLDEN SOY, and there was no confusion between the two products.

In May, 1943, as the result of a complaint of the Food and Drug Administration, Federal Security Agency, Soy Food Mills slightly redesigned the dress and style of its GOLDEN SOY carton and adopted the trade mark GOLDEN Wheat-Soy MIX (Plaintiff's Exhibit 11) for the same product previously sold as GOLDEN SOY (R. 125-128). GOLDEN Wheat-Soy MIX continued to enjoy the same substantial public acceptance as its predecessor product. In June, 1943, Soy Food Mills introduced another product which it termed GOLDEN MIX for muffins (R. 143). This product also contained a substantial percentage of soy flour, and the label (Plaintiff's Exhibit 16) was generally similar to the GOLDEN Wheat-Soy MIX label.

In September, 1943, Pillsbury introduced its product GOLDEN BAKE MIX (Plaintiff's Exhibit 22). The evidence established that GOLDEN BAKE MIX was the same identical product first introduced in February, 1943, as Pillsbury's WHEAT-SOY-RICE (R. 316-17). From the outset it was a direct competitor of Petitioner's GOLDEN Wheat-Soy MIX not only because both products contained a substantial percentage of soy flour and were sold and merchandised on the basis of the use of this ingredient, but also because both products were sold as "premium" products commanding a

price several cents in excess of ordinary pancake flours. Pillsbury had full knowledge of GOLDEN Wheat-Soy MIX and GOLDEN MIX for muffins at the time it introduced GOLDEN BAKE MIX (R. 376; See also Defendant's Exhibits LL1-LL5).

The GOLDEN BAKE MIX trade mark, carton, and label very closely resembled GOLDEN Wheat-Soy MIX in many respects. Both utilized the same identical colors blue, yellow, red, and white, and the same arrangement of color panels. Both used the color red in direct association with statements as to the soy content. Both used the word "mix" as a part of the trade mark of the product so that the composite trade marks were absolutely identical except for the middle words. GOLDEN BAKE MIX was advertised as, "The New Soy Sensation" (R. 260).

It was admitted in the pleadings and stipulated at the trial that following the introduction of GOLDEN BAKE MIX there was widespread confusion in the trade between Respondent's GOLDEN BAKE MIX and Petitioner's GOLDEN Wheat-Soy MIX. Petitioner made no serious attempt to prove the existence and extent of this confusion because it relied on the judicial admission of its existence. It is even doubtful whether on the state of the Record the District Court would have permitted proof of confusion (R. 693).

Following the introduction of GOLDEN BAKE MIX, Petitioner brought this action charging unfair competition and infringement of the label copyright on its GOLDEN Wheat-Soy MIX label. The Respondent, Pillsbury, filed a Counterclaim in which it charged Petitioner with infringement of an old trade mark on GOLDEN BAKE which it had used in a limited way for an ordinary pancake flour. There was no close resemblance between the GOLDEN BAKE label and the GOLDEN BAKE MIX label. This was affirmatively averred by Pillsbury's counsel in his Opening State-

ment (P. 38, Record in District Court). Pillsbury also charged Soy Food Mills with unfair competition on the theory that GOLDEN BAKE MIX was, in effect, nothing more than a "continuation" of GOLDEN BAKE, and that Soy Food Mills had imitated the color design and arrangement of the GOLDEN BAKE label. Infringement of certain label copyrights, including one on the GOLDEN BAKE label, was also charged.

The status of the product GOLDEN BAKE, and resultantly of the GOLDEN BAKE trade mark, was a factual issue which was vigorously contested at the trial. It was conclusively established that Petitioner had never heard of the GOLDEN BAKE product, the trade mark, or the label at the time it introduced GOLDEN SOY, GOLDEN Wheat-Soy MIX, and GOLDEN MIX (R. 148, 183, 122-128). Pillsbury did own a trade mark registration for the mark but this registration was for *wheat flour only*, and it was proved at the trial that there were more than 90 registrations for wheat flour in which the word GOLDEN is the first word (R. 730, Plaintiff's Exhibit 34). GOLDEN BAKE was never advertised (R. 237), was never sold in competition with Petitioner's products, and as the District Court found, there was no evidence that it enjoyed any degree of good will whatsoever in the minds of the public, wholesalers, or jobbers. Actually, during the period when it was being sold, its selling price was about one half that of GOLDEN Wheat-Soy MIX and GOLDEN BAKE MIX (R. 605). As of the date of the trial it was not being sold (R. 230).

Pillsbury also contended that it had some sort of proprietary rights in flour carton labels in which the colors blue and yellow were utilized. The GOLDEN BAKE label was blue and yellow after 1940, and SNO-SHEEN cake flour had been sold very extensively under blue and yellow labels, which were later changed to different colors. At the trial

Mr. Files, the executive Vice-President of Pillsbury, admitted that as of that date the only product which was being extensively sold by Pillsbury under a blue and yellow label was GOLDEN BAKE MIX (R. 334-337).

The trial was very vigorously contested and lasted seven full days, all of the testimony being given orally. Extensive main briefs and reply briefs were filed by both parties, and there was an oral argument lasting the better part of a full day.

The Decision of the District Court

The District Court (Judge Walter J. LaBuy) found for the Petitioner on all of the issues of the case, except that he found that the Pillsbury product GOLDEN BAKE MIX was of good quality, and not inferior as alleged on information and belief in the Complaint. Complete Findings of Fact and Conclusions of Law were entered and these have been included in the Appendix under "A". The decree (R. 905) enjoined Pillsbury from selling a pancake mix containing a soy bean ingredient under the trade mark GOLDEN BAKE MIX; from selling such a product in a carton and under a label confusingly similar to Petitioner's; from using the slogan, "The New Soy Taste Sensation". Infringement of Petitioner's label copyright on the GOLDEN Wheat-Soy MIX label was held to have been established and was enjoined. An accounting for damages and profits was ordered. Petitioner was exonerated from all of Pillsbury's charges against it. A supersedeas bond in the amount of $100,000.00 was fixed and supplied by Pillsbury.

The Decision of The District Court on Rehearing

Following the decision of the District Court, Pillsbury filed a motion for a rehearing and a reconsideration of sub-

stantially all of the Findings of Fact and Conclusions of Law. Judge LaBuy allowed the motion for rehearing, and permitted Pillsbury to take additional testimony dealing with the extent and continuation of use of the old GOLDEN BAKE trade mark. Practically all of the Findings of Fact and Conclusions of Law were reconsidered, and further detailed briefs were filed. There was also a second oral argument.

Following this, the District Court rendered a short memorandum opinion in which certain of the Findings of Fact and Conclusions of Law were stricken or modified. These changes have been indicated in the Appendix. In substance, the decision on the rehearing did not change any of the basic conclusions but merely corrected certain detailed statements which the court felt had been stated inaccurately or too broadly in the original decision.

THE DECISION OF THE CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals reversed the decision of the District Court to the extent that the District Court decision had found Pillsbury guilty of unfair competition in its sale of GOLDEN BAKE MIX and guilty of copyright infringement of the GOLDEN Wheat-Soy MIX label. It affirmed the District Court on the issues presented by Pillsbury's Counterclaim. In other words, the decision of the Circuit Court of Appeals dismissed both the Complaint and the Counterclaim and left the parties exactly where they were at the time the litigation was commenced. This, *despite the fact that it was admitted, agreed, and stipulated that there was extreme confusion in the trade between Petitioner's GOLDEN Wheat-Soy MIX and Pillsbury's GOLDEN BAKE MIX.*

The Circuit Court of Appeals' opinion flatly overruled practically all of the Findings of Fact of the District Court,

more by implication than directly. The following are examples of Findings of Fact which were more or less directly overruled:

(a) The District Court found (Finding of Fact 16 — Bill of Complaint):

> "Prior to its introduction of WHEAT-SOY-RICE in February, 1943, and GOLDEN BAKE MIX in September, 1943, defendant had never previously used the designation 'Mix' to refer to a prepared pancake preparation."

However, the Circuit Court of Appeals' opinion states (*infra*, p. 57):

> "Moreover, in two prior instances, one of which appeared as early as 1933, it (Pillsbury) used the word 'Mix' on its cartons." (Parenthetical word supplied)

(b) The District Court found (Findings of Fact 9 and 12 — Counterclaim):

> "There is no evidence that the product GOLDEN BAKE enjoys or has enjoyed in the minds of the public, wholesalers, or jobbers any degree of good will."
>
> "The defendant virtually discontinued the manufacture and sale of GOLDEN BAKE at the time it introduced the competitive product GOLDEN BAKE MIX."

As against this, the C.C.A.'s opinion states (*infra*, p. 57):

> "GOLDEN BAKE was the trade mark name which defendant selected and registered in October, 1935. It was the name used continuously thereafter. It applied to pancake flour which contained soy bean flour, or to any other ingredient so used. As to this the evidence is conclusive."

(c) Finding of Fact 5 — Bill of Complaint of the District Court reads as follows:

> "At the time of the introduction of GOLDEN SOY and continuously from November, 1942, until the introduction of defendant's product GOLDEN BAKE MIX in September, 1943, there was no confusion of trade mark and/or package between GOLDEN SOY, GOLDEN Wheat-Soy MIX, and any other competitive product of the defendant then on the market, including defendant's products GOLDEN BAKE and WHEAT-SOY-RICE."

On this point the C.C.A.'s opinion finds (*infra*, p. 58):

> "A third reason for this conclusion is the fact that if there be confusion in the two carton covers, either in color effect or the use of words or both, said confusion is due to plaintiff's adoption of defendant's trade mark with which it was in alleged confusing competition as to the colors because plaintiff took defendant's prior use of blue and yellow background and built thereon."

The entire opinion of the Circuit Court of Appeals is replete with errors and mis-statements of fact. It is difficult to believe it but *one portion of the opinion extending for more than a printed page does not contain a single accurate statement.* (See Appendix "B", *infra*, pp. 55-6) These errors and mis-statements are of many types including errors as to the facts of the case, as to the contentions of the parties, as to the evidence which was before the Court, and even as to the Findings of Fact and Conclusions of Law at which the District Court arrived. It is apparent that the Court missed the entire point of the case. Further, it is not an exaggeration to say that the decision and opinion represent a shocking deviation from established judicial procedure. In "B" of the Appendix the errors of the Court have been under-

lined in red ink and in "C" of the Appendix the major errors and misstatements have been expressly set out and their effect on the decision analyzed.

Jurisdiction

Petitioner invokes the jurisdiction of this court under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, U. S. C., Title 28, Section 347, to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit of April 10, 1947, reversing the decree of the District Court for the Northern District of Illinois, Eastern Division (R. 905), which decree found Respondent guilty of unfair competition and copyright infringement. This Petition is presented within the time allowed by statute.

Questions Presented

1. Where a finding of fact of a District Court is predicated on an admission in the pleadings and a stipulation at the trial, it is beyond the power of a reviewing court to set aside the finding.

2. Where a finding of fact of a District Court is based on conflicting oral testimony and there is no indication that the testimony supporting the finding is dishonest or unmistakably incredible, the finding is conclusive under Rule 52 (a) Rules of Civil Procedure.

3. Where the decision of a Circuit Court of Appeals is almost entirely based on direct mis-statements of fact and on evidence not in the record, it is incumbent on this Court to exercise its supervisory powers to preserve an orderly and proper administration of the law.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

1. On the question of the force and effect of a judicial admission and on the question of the scope of appellate review of findings of fact, the Circuit Court of Appeals in this case rendered a decision which is in conflict with the decisions of this Court and of other Circuit Courts of Appeals.

2. The decision of the Circuit Court of Appeals in this case is unique in its departure from the accepted and usual course of judicial proceedings, in that it is based on a clearly erroneous statement of facts and on evidence that is not in the Record, and calls for the exercise of this Court's powers of supervision in the realm of judicial administration of the law.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the Record and all proceedings in the case, numbered and entitled on its Docket No. 8996, *Soy Food Mills, Inc.*, Plaintiff-Appellee v. *Pillsbury Mills, Inc.* (formerly by name Pillsbury Flour Mills Co.), Defendant-Counterclaimant-Appellant, and that the said decision of the Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court and that your Petitioner may have such

other and further relief in the premises as this Court may deem meet and just; and your Petitioner will ever pray.

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BRIEF IN SUPPORT OF PETITION

A. PRELIMINARY

The facts of the case have been stated in the Petition and the legal and jurisdictional questions involved have been summarized. In this brief we will expand our argument with respect to each of the questions presented, considering them in the order listed in the Petition.

B. ARGUMENT

I. WHERE A FINDING OF FACT OF A DISTRICT COURT IS PREDICATED ON AN ADMISSION IN THE PLEADINGS AND A STIPULATION AT THE TRIAL, IT IS BEYOND THE POWER OF A REVIEWING COURT TO SET ASIDE THE FINDING.

The extreme novelty of this case is the reversal by the Circuit Court of Appeals of the decree of the District Court because of a determination which the Circuit Court of Appeals had no power to make. Judge Evans, speaking for the Court, found that there was no confusion between Petitioner's GOLDEN Wheat-Soy MIX label and Respondent's GOLDEN BAKE MIX label although Respondent admitted such confusion in its Answer and so stipulated at the trial. Having found no confusion between the two labels, Judge Evans ruled that there was no unfair competition. In making this determination of no confusion the Court flagrantly exceeded its powers and violated a fundamental rule of this Court.

a. Admissions by Respondent of confusion.

In Paragraph 5 of its Complaint, Petitioner alleged that the trade marks of Respondent's GOLDEN BAKE MIX and Peti-

tioner's GOLDEN Wheat-Soy MIX and the cartons in which they are packed "are so similar that the purchasing public and customers generally have been confused and deceived and will be further confused and deceived as to the origin of the respective products." In Paragraph 5 of its Answer the Respondent admitted that such "trade marks, packages, and cartons" are "confusingly similar".

At the trial, during the direct examination of Richard H. Thomas, Jr., President of Petitioner, Mr. Thomas was asked what personal knowledge he had of any confusion *between Petitioner's GOLDEN Wheat-Soy MIX label on the one hand and Respondent's GOLDEN BAKE MIX label on the other.* Counsel for Respondent objected to an answer to the question on the ground that it contained hearsay, and then counsel for Respondent went on as follows:

> "Mr. Williamson: I might say further, to expedite this trial, we admit there has been plenty of confusion. We say the plaintiff caused that confusion. We might shorten the whole line of questioning. *We admit there has been plenty of confusion between these products and we say the plaintiff caused it.*" (R. 137).

Later in his testimony Mr. Thomas asserted, in answer to a question put to him on cross-examination by Respondent's counsel, that Respondent's GOLDEN BAKE MIX was marketed "in a package which you yourself admitted is similar, and confusing, to ours." Further, he testified that "when you take the product out of that package and put it in a package that is so confusing and similar to ours that everybody admits, of course, we object to it" (R. 178). No attempt was made by Respondent's counsel during the entire trial to contradict this testimony and it was later corroborated by Mr. Files, the executive Vice-President of Pillsbury, as follows (R. 331):

Q. "You selected a package which was almost identical with that of the successful product on the market, didn't you?"

A. "It proved to be, yes. We did not select it with that thought in mind".

To remove the matter from all doubt, on Petitioner's direct examination of Jerome S. Bond, the witness was asked to testify as to the likelihood of confusion between Petitioner's GOLDEN SOY package and Respondent's old GOLDEN BAKE package, an issue which was involved in the Counterclaim. Respondent's counsel objected to the question on the ground that the witness had not been qualified to testify as to confusion that might arise in the consumer's mind. At this point, the following colloquy took place between the Court and counsel (R. 693):

> "The Court: I thought it had been stipulated here that the public is confused and has been confused and will continue to be confused. So I don't think that is an issue any more.
>
> "Mr. Herron: It is not stipulated the public will be confused between these two packages (indicating), your Honor.
>
> "The Court: Oh, you mean the GOLDEN BAKE?
>
> "Mr. Herron: And GOLDEN SOY. Mr. Bond has testified he has been familiar with labels all over the country for years, he has been in the lithographing business for twenty-five years, and he has seen all types of labels of different companies.
>
> "The Court: This is a comparison between GOLDEN BAKE Pancake Flour and GOLDEN SOY Griddle Cake MIX?
>
> "Mr. Herron: That's right.
>
> "The Court: He may answer."

After this colloquy there can be no question that the Court's interpretation of Respondent's pleading and the stipulation was accepted by Respondent. We have here a judicial admission of the fact of confusion *between Petitioner's GOLDEN Wheat-Soy MIX package and Respondent's GOLDEN BAKE MIX package.* The Circuit Court of Appeals completely ignored this admission and went on to hold that there was *no* confusion between the two packages. Petitioner earnestly contends that the learned Court exceeded its powers when it conceived that the matter of confusion was open to it for determination. That misconception is basically the reason for the Court's reversal of the District Court.

b. It is the rule of this Court that a party will not be heard to question on review a stipulation or admission freely entered into in the trial court.

In the case of *Brown* v. *Gurney* (1906) 201 U. S. 184, 190, this Court, speaking unanimously through Chief Justice Fuller, affirmed the Supreme Court of Colorado when that Court applied the rule

> "that where the existence of certain facts is assumed in the trial court, and the trial proceeds without objection, on that assumption, and the case is decided in reliance thereon, neither party will be heard in the court of review to question there, for the first time, the existence of the facts, and especially not where the alleged omissions might have been supplied if called to the attention of the trial court."

In *Oscanyan* v. *Winchester Repeating Arms Company* (1881) 103 U. S. 261, 263, this Court said:

> "The power of the court to act in the disposition of a trial upon facts conceded by counsel, is as plain as its power to act upon the evidence produced. The question in either case must be whether the facts, upon which it is called to instruct the jury, be clearly established . . . .
>
> "In the trial of a cause, the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof; . . ."

The legal effect of admissions or stipulations of counsel has received the attention of Dean Wigmore. Such an admission or stipulation

> "has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it . . . It is, in truth, a substitute for evidence, in that it does away with the need for evidence." *Wigmore on Evidence* (2nd Ed.) Sec. 2588.

Wigmore goes on to point out:

> "The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, i. e. the prohibition of any further dispute of the fact by him, and of any use of evidence to disprove or contradict it." *Ibid*, Sec. 2590.

c. *Decisions in the lower Federal Courts unanimously hold that a judicial admission by a party is binding on the party and, in the absence of patent error, may not be ignored by an appellate court.*

A leading case is *Larson Company* v. *Wrigley* (1918) 253 Fed. 914 (CCA 7). Wrigley brought an action against Larson for trade mark infringement and unfair competition, alleging that confusion had arisen between Larson's "WINTERMINT" brand of chewing gum and Wrigley's "DOUBLEMINT" brand. In its answer and counterclaim Larson admitted confusion, but alleged that its package was older than the Wrigley package. Both the complaint and counterclaim were dismissed and Larson appealed. The Seventh Circuit disagreed with the lower court's finding of no confusion by a mere comparison of the packages on the ground that confusion was alleged by Wrigley and admitted by Larson. Thus, the Court found there was more in the record than simply the two packages on the issue of confusion. The Court, accordingly, reversed the decree dismissing the counterclaim, saying in part as follows (P. 918):

> "With nothing before us but the packages, we would be inclined to concur in the finding. But the record contains also Wrigley's averment in his bill that confusion had arisen. There was no proof to support that averment and Larson's parallel averment. But Larson's counsel may have relied on the stipulation of fact in bill and counterclaim to save hunting up and bringing in witnesses of wrongful sales. Furthermore, Wrigley and another interested with him gave testimony as experts in the gum business that confusion was likely to result from the similarities; and so there is a basis for at least the possibility that Wrigley's averment of fact and his expert opinion may be true, and that Larson's diminished sales came from Wrigley's simulation of the "WINTERMINT" package.

> "In such a situation, the rule, in our judgment, is this: In a real and legitimate controversy, a party should be left within the knot of his averments in pleadings and admissions in testimony, unless the court can find an absolute demonstration from other evidence in the case or from facts within judicial notice, like the laws of physics, etc., that under no circumstances could the averments and admissions be true."

The *Gurney* case, referred to previously, was cited with approval in *United States Shipping Board* v. *South Atlantic Dry Dock Co.* (1927) 19 Fed. (2d) 486 (CCA 5), where the Court held as follows:

> "A fact or conclusion admitted by a party in the trial court for the purposes of the trial is not open to be controverted or put in issue by that party in the appellate court. *Brown* v. *Gurney*, 201 U. S. 184, 190, 26 S. Ct. 509, 50 L. Ed. 717. The contention under consideration is inconsistent with a formal admission made by the defendant in the trial court, which imported that its relation to the contracts sued on was such as to make it liable and suable thereon. Because of that fact, in addition to the reasons supporting conclusions stated in the opinion rendered when this case was here before, that contention is not sustainable."

In *Andrews* v. *St. Louis Joint Stock Land Bank* (1942) 127 Fed. (2d) 799, 804 (CCA 8), the plaintiff bond holders in an action for the segregation of assets stated at the trial that because of accounting difficulties they limited their claim to the proceeds of certain mortgages only and waived their claim to the proceeds of other mortgages. On appeal they attempted to reverse their position, and the Court denied them this opportunity, saying that

> "A judicial admission is conclusive upon the party by whom made, and stipulations of counsel may have the effect of eliminating from the trial of a cause issues that otherwise might be presented."

and citing the case of *Arkansas Valley Sugar Beet Company* v. *Fort Lyon Canal Company* (1909) 173 Fed. 601 (CCA 8), wherein the Court said at page 603 that

> "A stipulation to settle controversies, or to assist a court in deciding them, ought not to be discouraged by a narrow and unreasonable construction, that would defeat the manifest intention of one of the parties, acceded to by the other."

These cases outline two grounds for sustaining the binding effect of a judicial admission. First, there is the element of estoppel. Second, the admission is regarded as a substitute for evidence, which a court is able to act upon, as if proof had been furnished by evidence. On this aspect of a judicial admission, Judge Hutcheson of the Fifth Circuit has remarked as follows:

> "But these rules aside, it is fundamental that judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them. A fact admitted by answer is no longer a fact in issue. Considered as a whole then, the order stands as valid beyond dispute." *Hill* v. *Federal Trade Commission*, (1941) 124 Fed. (2d) 104, 106.

The proposition under discussion is one on which there is no divergence of opinion. There is no contrary view. The existence of confusion between GOLDEN Wheat-Soy MIX and GOLDEN BAKE MIX was made the subject of a

judicial admission which it was beyond the power of the Seventh Circuit Court of Appeals to disturb.

II. WHERE A FINDING OF FACT OF A DISTRICT COURT IS BASED ON CONFLICTING ORAL TESTIMONY AND THERE IS NO INDICATION THAT THE TESTIMONY SUPPORTING THE FINDING IS DISHONEST OR UNMISTAKABLY INCREDIBLE, THE FINDING IS CONCLUSIVE UNDER RULE 52 (a) RULES OF CIVIL PROCEDURE.

The Circuit Court of Appeals' setting aside of the Findings of Fact of the District Court on the Complaint reveals a clear misunderstanding of the scope of judicial review under Rule 52 (a) Rules of Civil Procedure, and conflicts with decisions of this Court and of other Federal Courts. Intertwined with the Circuit Court of Appeals holding in this case is a glaring refusal to observe certain fundamental principles of judicial review which, it is submitted, must be observed. The utter failure of the Circuit Court of Appeals to consider these principles led it far astray. It calls for supervision by this Court to a degree, we venture to suggest, that few decisions of lower Courts have equalled.

a. *The Circuit Court of Appeals made certain findings in its Opinion which flatly contradict Findings of Fact made by the District Court and caused the Court to reverse the District Court on Petitioner's Complaint.*

Rule 52 (a) provides, in part, as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The District Court found Respondent guilty of unfair competition and copyright infringement. The decision of the

District Court was reversed by the Circuit Court of Appeals on the basis of certain findings made by the appellate court as set forth below. The opinion of the Circuit Court of Appeals is not precise, and in most instances the reversal of the Findings of Fact of the District Court is accomplished by indirection.

However, such findings as the Circuit Court of Appeals made, necessitated, in its view, a reversal of the District Court. Wholly aside from the Circuit Court of Appeals' finding of no confusing similarity between Petitioner's GOLDEN Wheat-Soy MIX label and Respondent's GOLDEN BAKE MIX label (which that Court was not privileged to make for reasons already discussed) these findings were as follows:

1. The Circuit Court of Appeals found that Respondent's use of its GOLDEN BAKE label is "clear" (*infra* p. 50) and that Respondent's use thereof has been continuous since 1935 (*infra*, p. 57).

This finding was fundamental to the Circuit Court of Appeals' approach to its decision in this case. A prior, effective user by Respondent of its GOLDEN BAKE label was necessary for the further finding that Petitioner caused what confusion may have existed between its GOLDEN Wheat-Soy MIX label and Respondent's GOLDEN BAKE MIX label. *Hanover Star Milling Company* v. *Metcalf* (1916) 240 U. S. 403; *A. L. I. Restatement of Torts*, Sections 715, 753. This finding of the Circuit Court of Appeals was made in the face of overwhelming evidence to the contrary sustaining the District Court's Findings of Fact on the Counterclaim Numbers 7, 8, 9, 10, and 12 (R. 890).

There was no serious dispute by Respondent as to the Findings by the District Court that its GOLDEN BAKE

product was not recognized by the public as a product of Respondent; that GOLDEN BAKE was never advertised; that it enjoyed no good will among the public, wholesalers or jobbers; that it was not a product which competed with Petitioner's products; and that its manufacture and sale were virtually discontinued prior to the introduction of GOLDEN BAKE MIX. Evidence in the record massively supported these Findings, (R. 230, 237, 298, 300, 540, 543-6, 549, 599, 605, 609, 722). In fact, Respondent conceded these findings substantially to be true and offered the excuse that the Federal Government during the War greatly restricted the use of the ingredients of GOLDEN BAKE, forcing Respondent to discontinue it. (Sec. P. 7 of Respondent's main brief in the District Court). This excuse was expressly found not to be valid by the District Court. (Finding No. 13 — Counterclaim; R. 890). The Circuit Court of Appeals recites no evidence and, indeed, gives no reason for setting aside these Findings. Its Opinion merely *assumes* in passing that Respondent's use of GOLDEN BAKE "is clear" and has continued since 1935. Nothing in the Record substantiates this in the slightest degree.

2. The Circuit Court of Appeals found that Respondent's GOLDEN BAKE MIX label was a "legitimate extension" of its GOLDEN BAKE label (*infra*, p. 58).

This finding is absolutely meaningless without a consideration of the respects in which the GOLDEN BAKE label was extended and the circumstances of the extension. The District Court undertook such a consideration. To state the finding, as the Circuit Court of Appeals did, is to beg the question at issue. There still remains to be decided whether Respondent's GOLDEN BAKE MIX label was deceptively similar to Petitioner's GOLDEN Wheat-Soy MIX label. It is

conceded by Respondent that its GOLDEN BAKE MIX label and its GOLDEN BAKE label were not similar (see Opening Statement of Respondent's counsel at Page 38 in the District Court Record). Even the Circuit Court of Appeals did not find that they were similar. The GOLDEN BAKE MIX label was a *new* label — bearing no close resemblance to Respondent's GOLDEN BAKE label. The District Court so found (Finding No. 11—Complaint; R. 887). (See also Respondent's Exhibit A, R. 772 and Respondent's Exhibit H, R. 779).

No legal authority whatever exists for the proposition that one may change a package label with knowledge of a rival's established label if the change results in confusion, or a likelihood of confusion, between the two labels. No case has been found substantiating the holding of the Circuit Court of Appeals in this respect and, it is submitted, none can be found. *Socony-Vacuum Oil Company* v. *Oil City Refiners* (1943) 136 Fed. (2d) 470 (CCA 6) appears to be one of the few cases touching on this issue. In that case, the defendant had altered its older FLYING HORSE trade mark so that it resembled plaintiff's widely displayed, though later, mark, and the resemblance was enjoined. The "extension" of the defendant's trade mark was found to result in confusion and unfair trade.

Thus, even assuming that Respondent's user of its GOLDEN BAKE label was clear, under the holding of the 6th Circuit in the Socony-Vacuum *case, a change in that label resulting in confusion is an unfair trade practice.* Further, to permit a company like Respondent stealthily and haphazardly to design, for instance, a hundred labels for use on secondary or carefully parcelled-out products, later to alter each in turn to meet a rival's threat and to spread the altered label across the nation with loud bleatings and indignation "would broaden the scope of legitimate monopoly into the field of unfair trade." (136 Fed. (2d) at Page 474).

3. The Circuit Court of Appeals found that, even admitting that there was confusing similarity between Respondent's GOLDEN BAKE MIX label and Petitioner's GOLDEN Wheat-Soy MIX label, Petitioner cannot prevail on its Complaint because it caused the confusion. (*infra*, pp. 58-62).

Perhaps the controlling predication of the Circuit Court of Appeals' opinion was that there was no confusion between these two labels. However, the Court went on to hold that even if there were confusion, Petitioner caused it. Such a finding is necessarily premised on (1) a finding of Respondent's "clear and continuous use of its GOLDEN BAKE label" and (2) a finding that its GOLDEN BAKE MIX label was a "legitimate extension" of its GOLDEN BAKE label. These two findings have been discussed in the preceding paragraphs. If either of these findings is destroyed, the finding that Petitioner caused the confusion in turn must fall, and the gross error of the Circuit Court of Appeals is clearly exposed.

4. The Circuit Court of Appeals found that Respondent's GOLDEN BAKE MIX label was designed and used in good faith in spite of its prior knowledge of Petitioner's admittedly confusing GOLDEN Wheat-Soy MIX label because —

   (A) Respondent had already "appropriated" the word "GOLDEN" (*infra*, p. 61).
   (B) Respondent included the word "Pillsbury's" on the label (*infra*, p. 62), and
   (C) Respondent had developed a long line of blue and yellow labels (*infra*, p. 62).

These determinations are sprinkled with error. First, in a case of actual competition, good faith is no defense, as

this Court and many of the Circuits have held. *Thaddeus Davids Co.* v. *Davids* (1914) 233 U. S. 461; *La Touraine Coffee Co.* v. *Lorraine Coffee Co.* (1946) 157 Fed. (2d) 115 (CCA 2); *Coty Inc.* v. *Parfums de Grande Luxe, Inc.* (1924) 298 Fed. 865, 870 (CCA 2).

Second, the finding of the "appropriation" of the word "GOLDEN" flies in the face of uncontradicted evidence that that word has been used for years at various times by other manufacturers and dealers on over *90* labels for flour and flour products including pancake flour, none of which has been manufactured or marketed by Respondent (plaintiff's Exhibit 34; R. 730). A recent case in the Second Circuit deals with the word "Chateau" in the sale of wines. Both plaintiff and defendant had used it as the first of a two-word trade mark for wine. The Court held that the word could not help the plaintiff establish a valuable trade mark since it was already "in common use in advertising wines" and since the plaintiff "took the risk that competitors, old and new, could also use that common name." The Court held specifically that this determination was "fundamental" to its holding in the case. *Eastern Wine Corporation* v. *Winslow* (1943) 137 Fed. (2d) 955 (CCA 2).

Third, the use of the word, "Pillsbury's" on Respondent's GOLDEN BAKE MIX label was said by the Court to be "most persuasive evidence" of Respondent's good faith (R. 963). However, this consideration is of slight value if good faith is no defense. Further, if the use of "Pillsbury," was intended to be a display of good faith it failed in its purpose because, despite the use, there was tremendous confusion between the GOLDEN Wheat-Soy MIX label and the GOLDEN BAKE MIX label as the parties agreed and stipulated.

Fourth, the Record flatly refutes the finding that Respondent had developed a long line of blue and yellow labels. Two labels with predominantly blue and yellow colors had

been developed by Respondent for use on cake flour and biscuit flour; both of these labels were discontinued some time before the trial (R. 333-337). By contrast, fourteen labels had been designed and used by Respondent for other principal products without the slightest attempt to perpetuate "a blue and yellow line" (R. 333-7). In addition, shortly before the trial of this case, Respondent brought out a new line of packages for practically all of its important packaged products which paid no respect whatever to its so-called "blue and yellow line of packages" (R. 341). The GOLDEN BAKE label was changed to blue and yellow in 1940, but in such a guarded way that no witness was produced other than Respondent's employees who had ever seen it or heard of it, and the witness, F. D. Stull, an A. & P. Merchandising Specialist with seventeen years' experience throughout the country, expressly testified he had no recollection of ever having seen it (R. 751). Such evidence makes short shrift of the testimony of Respondent's Vice-President Files that Respondent "always" tried to carry out its blue and yellow package scheme (R. 312). The Circuit Court of Appeals' finding that Respondent had developed a long line of blue and yellow labels, like other findings it made, is a strange distillation — without the barest support in the Record.

b. *These findings of the Circuit Court of Appeals reveal a neglect of the paramount rule of judicial review that findings based on oral testimony are unassailable on appeal unless the error is unmistakably clear.*

Unhesitatingly, we assert that the Circuit Court of Appeals in this case abused its powers of review. It is impossible to believe that it seriously considered the record of oral

testimony. Had there been such consideration, nowhere in the Record, taken as a whole or in parts, is there support for the belief that the testimony favorable to Petitioner was dishonest or without some persuasiveness. In the absence of such a strong belief, we submit that the law of the land is that findings based on conflicting oral testimony are unassailable and conclusive on appeal. They cannot be "clearly erroneous".

The law was laid down by Mr. Justice Holmes in the leading case of *Adamson* v. *Gilliland* (1917) 242 U. S. 350, where the Circuit Court of Appeals for the Eighth Circuit had reversed a District Court in a patent infringement suit. This Court, in a unanimous decision, reversed the Circuit Court of Appeals solely on the ground that the findings of the District Court on conflicting testimony were "unassailable". The *Adamson* case has been cited with approval in *Alabama Power Company* v. *Ickes* (1938) 302 U. S. 464, 477, *Williams* v. *United Shoe Machinery Corporation* (1942) 316 U. S. 364, 367, and as recently as *Walling* v. *General Industries Company* (1947) 91 L. Ed. 799, 802, the last two cases being decided after the adoption of Rule 52 (a). To the same effect is *Butte and S. Copper Co.* v. *Clark-Montana Realty Co.* (1919) 249 U. S. 12, 30 where the Court in an unanimous opinion quoted with approval the holding of the Circuit Court of Appeals for the Ninth Circuit that "findings so made upon conflicting testimony are conclusive upon this appeal".

On many occasions this Court has acted as the first reviewing Court of a lower Court's findings. In *U. S.* v. *United Shoe Machinery* (1918) 247 U. S. 32, 41, the District Court's finding in an anti-trust case was sustained. The Court held that, while the testimony was conflicting below,

> "we should risk misunderstanding and error if we should attempt to pick out that which makes against it and disregard that which makes for it and judge

> of witnesses from their reported words as against their living presence,—the advantage which the trial court had."

Another occasion was *Lawson* v. *U. S. Mining Company* (1907) 207 U. S. 1, where the Circuit Court had made no findings and the Circuit Court of Appeals had made findings in its Opinion. This Court held that a finding of the Circuit Court of Appeals must be accepted unless clearly and manifestly wrong, saying, in part, that

> "if the testimony does not show that it is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion." (207 U. S. at page 12).

The high significance of a "finding of fact" is brought out by Mr. Justice Frankfurter in *Baumgartner* v. *U. S.* (1944) 322 U. S. 665, at pages 670-1:

> "The phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment. Such a 'finding of fact' may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print. The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy."

Both the Eighth Circuit and the Fifth Circuit have consistently followed a particularized interpretation of Rule 52 (a). While these interpretations do not appear to be wholly consistent, if the Seventh Circuit in this case had followed

either interpretation, it must necessarily have arrived at a different conclusion. In *Sanders* v. *Leech* (1946) 158 Fed. (2d) 486 (CCA 5) Judge Hutcheson said at page 487 that an appellate Court may reverse a District Court's findings under Rule 52 (a)

> "(1) where the findings are without substantial evidence to support them; (2) where the Court misapprehended the effect of the evidence; and (3) if, though there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case."

In *Anderson* v. *Federal Cartridge Corp.* (1946) 156 Fed. (2d) 681, 684 (CCA 8), a case involving a finding of the District Court under the Fair Labor Standards Act, Judge Gardner held as follows with respect to Rule 52 (a):

> "The findings of the court are presumptively correct and will not be set aside unless resulting from an erroneous view of the law or are clearly against the weight of the substantial evidence, and in considering this question we view the evidence in the light most favorable to the prevailing party, the burden being on the unsuccessful party to show that the evidence compelled a finding in his favor."

See also *Cleo Syrup Corp.* v. *Coca Cola Co.* (1943) 139 Fed. (2d) 416, 418 (CCA 8).

In *U. S.* v. *Aluminum Co.* (1945) 148 Fed. (2d) 416 (CCA 2) Judge Learned Hand had occasion to consider the effect of Rule 52 (a) on the scope of judicial review. His words are particularly enlightening in a case such as this. He said as follows, at page 433:

"It is idle to try to define the meaning of the phrase, 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded. This is true to a considerable degree even when the judge has not seen the witnesses. His duty is to sift the evidence, to put it into logical sequence and to make the proper inferences from it; and in the case of a record of over 40,000 pages like that before us, it is physically impossible for an appellate court to function at all without ascribing some prima facie validity to his conclusions . . . What the plaintiff is really asking is that we shall in effect reconsider the whole evidence de novo, as it had come before us in the first instance. . . . However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable.' . . . The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds. . . . Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the

> finding is indeed 'unassailable', except in the most exceptional cases."

The enlightened view expressed by Judge Hand applies with no less persuasiveness to this case with its record of only 1,000 pages than it did in the *Aluminum* case with its record of over 40,000 pages. Witnesses testify through many channels other than mere words. Judge LaBuy's findings were based largely on oral testimony. There is not the slightest intimation that the testimony supporting his findings was dishonest or even unmistakably incredible. We earnestly submit that the long considered views of this Court and of other Circuit Courts of Appeals required the Circuit Court of Appeals in this case to sustain the findings of Judge LaBuy.

III. WHERE THE DECISION OF A CIRCUIT COURT OF APPEALS IS ALMOST ENTIRELY BASED ON DIRECT MIS-STATEMENTS OF FACT AND ON EVIDENCE NOT IN THE RECORD, IT IS INCUMBENT ON THIS COURT TO EXERCISE ITS SUPERVISORY POWERS TO PRESERVE AN ORDERLY AND PROPER ADMINISTRATION OF THE LAW.

In addition to the reasons outlined in the two preceding sections, there is a third and very cogent reason why this court should issue a writ of Certiorari in this case.

Rule 38, paragraph 5(b), of the Rules of the Supreme Court authorizes the issuance of a writ of Certiorari where a Circuit Court of Appeals

> "has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision."

It is fully appreciated that the power to grant Certiorari specified in the portion of the Rule just quoted is one which

has been exercised very sparingly in the past, and this is proper. However, the Rule does have a purpose, and the purpose must be that of permitting a degree of latitude for the granting of Certiorari in cases which cannot be strictly classified under any of the grounds for which the writ is more commonly issued.

An examination over the years of the nature of cases in which a writ of Certiorari has been issued leads to the conclusion that there is an appreciable number in which the Court has exercised the broad powers conferred on it by Rule 38, 5 (b) and has accepted cases in which a clear showing has been made that the decision of the court below is contrary to accepted judicial practice and particularly where the deviation has resulted in an incorrect and unjust result. Typical of such cases are the following: *Ellis* v. *Union Pacific R. R.*, 91 L. Ed. 433; *Ivanhoe Bldg. & Loan Assn.* v. *Orr, Trustee*, 295 U. S. 243; *U. S.* v. *Spaulding*, 293 U. S. 498; *Rogers* v. *Hill*, 289 U S. 582; *Aetna Casualty & Surety Co.* v. *Phoenix*, 285 U. S. 209.

Petitioner firmly believes that this is a case where Certiorari should be granted under the provisions of Rule 38, paragraph 5 (b), quoted above, even though the Court should determine that the case is not qualified in any other respect.

In this case the following factors are present:

(a) The course of reasoning by which the Circuit Court of Appeals arrived at its decision indicates (1) that it completely failed to grasp the salient facts of the case and (2) that the Court was influenced by certain factors which were completely outside of the Record and by certain other factors which, although in the Record, had no bearing whatsoever on the controlling issues. This matter has been covered in considerable detail in (C) of the Appendix attached hereto. In this Appendix we have specified the factual er-

rors which are present in the opinion of the Circuit Court of Appeals, the facts considered which were not in the Record, and the fact considered which, even though in the Record, had no bearing on the determinative issues. We will not repeat the argument here, but we do urge that the Court give careful consideration to the Appendix argument because we believe that it is perfectly clear that this is a case in which not only is the decision of the Circuit Court of Appeals wrong; it is a case in which the Circuit Court of Appeals did not follow the accepted course of judicial reasoning in arriving at its decision and was influenced by factors which should not have influenced it.

(b) The decision of the Circuit Court of Appeals has wholly failed to resolve the controverted issue between the parties because the parties themselves agreed and stipulated that there was confusion between their respective packages and the decision of the Circuit Court of Appeals found in effect that they did not know what they were talking about.

(c) The decision of the Circuit Court of Appeals is wrong. While the correctness or incorrectness of any particular decision may not be sufficient in and of itself to justify the issuance of a writ of Certiorari, surely it is a factor which should be considered in conjunction with other factors in determining whether or not the Circuit Court of Appeals has so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision is wrong because in the District Court Petitioner established a clear case of unfair competition. The only way in which the Circuit Court of Appeals was able to overcome the effect of this decision was by holding nugatory the stipulation and agreement of the parties that confusion existed and by erroneously twisting the facts to

give Pillsbury the benefit of defensive material which it was not entitled to have on the basis of the Record. If this defensive material, including the alleged early use of blue and yellow packages and of the trade mark GOLDEN BAKE, had any legal significance, then it should have been sufficient to give Pillsbury relief on its Counterclaim because both parties admitted and averred that the competitive situation was one which required correction. However, even the Circuit Court of Appeals did not presume to go that far in overruling the contested findings of the District Court.

C. CONCLUSION

Many factors in this case combine to invite the granting of the writ sought herein. Judicial clarification is most attractive when it is the handmaiden of justice in the particular case.

In the preceding discussion Petitioner believes that it has presented three separate and distinct reasons why this Court should hear and decide this case. The allowance of the Petition is respectfully solicited.

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APPENDIX A

DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AS AMENDED

Court's Findings of Fact

Bill of Complaint

1. Plaintiff's soy pancake flour product, Golden Soy, was first introduced in a blue and yellow carton of original design in November, 1942.

2. Golden Soy enjoyed an immediate and substantial public acceptance in the localities in which it was introduced, which localities included the principal metropolitan areas in the east and middle western sections of the country.

3. Plaintiff, Soy Food Mills, Inc., expended in excess of $200,000.00 in advertising Golden Soy and Golden wheat soy Mix during the year 1943 and the year 1944, up to September 25.

4. Defendant, Pillsbury Flour Mills Company, introduced Wheat-Soy-Rice, a soy pancake flour, directly competitive to plaintiff's product, Golden Soy, in February, 1943. Said product was sold in interstate commerce and distributed in eight particularly selected cities.

5. At the time of the introduction of Golden Soy and continuously from November, 1942, until the introduction of defendant's product, Golden Bake Mix, in September, 1943, there was no confusion of trade-mark and/or package between Golden Soy, Golden wheat-soy Mix, and any other competitive product of the defendant then on the market,

including defendant's products, Golden Bake and Wheat-Soy-Rice.

6. In May, 1943, plaintiff redesigned the dress and style of its Golden Soy carton and adopted the redesigned dress and style and the trade-mark Golden wheat-soy Mix for the same product previously sold as Golden Soy. This action was taken following a decree entered by Judge Barnes on May 21, 1943, in case No. 43 C 274, which was an action by the United States Food and Drug Administration against Soy Food Mills, Inc.

7. Golden wheat-soy Mix also enjoyed a substantial public acceptance from the date of its introduction until the date of the filing of the bill of complaint herein.

Amended by adding in line 2, after "acceptance", the following:

> "in the principal metropolitan areas in the east and middle western sections of the country."

8. Plaintiff introduced its product, Golden Mix, for muffins in a carton of original design in June, 1943. This product is a preparation containing soy flour which is particularly adapted for muffins.

9. Defendant, Pillsbury Flour Mills Company, first introduced Golden Bake Mix commercially in September, 1943. This product is the same product as that sold previously as Wheat-Soy-Rice.

10. Defendant's adoption of the Golden Bake Mix carton and trade-mark was deliberate and with knowledge of plaintiff's products, Golden Soy and Golden wheat-soy Mix.

11. There is no close resemblance between defendant's Golden Bake label and the defendant's Golden Bake Mix label except that both contain the words Golden Bake and both utilize the colors blue, yellow and white. In the case of Golden Bake Mix, the color red is prominently employed.

12. The dress and style of defendant's Golden Bake Mix carton and label more closely approximate plaintiff's Golden Soy and Golden wheat-soy Mix cartons and labels than is in any way justified by defendant's past use of the trade-mark Golden Bake and blue and yellow color combinations for Golden Bake and other products.

13. The Golden Bake Mix label adopted by defendant in September, 1943, containing illustrations of pancake and waffle dishes on the reverse side of the box closely resembles the label on plaintiff's Golden wheat-soy Mix carton. Evidence shows that this is the first time that Pillsbury Flour Mills Company used this type of illustration on their food product cartons.

Last sentence only *stricken* by Court's amendment.

14. In its advertising and sale of Golden Bake Mix defendant has utilized the slogans, "The New Soy Taste Sensation" and "The New Soy Sensation", in close imitation of plaintiff's trade-mark slogan, "The Soy Bean Taste Sensation", used on all of plaintiff's packages and all or practically all of plaintiff's advertising.

15. Prior to its introduction of Golden Bake Mix in September, 1943, defendant had never previously used a label color scheme comprising the colors, blue, yellow, red and white.

Stricken by Court's amendment.

16. Prior to its introduction of Wheat-Soy-Rice in February, 1943, and Golden Bake Mix in September, 1943, defendant had never previously used the designation "Mix" to refer to a prepared pancake preparation.

17. Deceptive similarity and confusion is admitted by both parties between the packages of defendant's Golden

Bake Mix and plaintiff's packages of Golden Soy and Golden wheat-soy Mix.

18. Plaintiff has proved that Golden Bake Mix has been and is being passed off as plaintiff's product.

Stricken by Court's amendment.

19. Defendant has been guilty of unfair competition toward plaintiff in the advertisement, offering for sale and sale of its product Golden Bake Mix, continuously from the date of its introduction to the present day.

20. Plaintiff has suffered substantial damages to its business and good will as the result of defendant's unfair competition.

21. The exact amount of the recovery which plaintiff is entitled to receive from defendant should properly be determined by a master appointed for that purpose by this Court.

22. Plaintiff is the owner of label copyright registration No. 2[illegible]789 for its Golden wheat-soy Mix label. This copyright registration has been and is being infringed by defendant's Golden Bake Mix label.

Stricken by Court's amendment.

23. There is no evidence to support the defendant's contention that the plaintiff was guilty of unclean hands prior to and at the time of the filing of the bill of complaint.

Findings of Fact

Counterclaim

1. Defendant is the owner of the trade-mark, Golden Bake, registered in the United States Patent Office for wheat

flour on October 29, 1935, Registration No. 329,356. This trade-mark has not been infringed by plaintiff's trade-marks, Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins.

2. For several years prior to January, 1943, defendant, Pillsbury Flour Mills Company, manufactured and sold an ordinary pancake flour not containing soy flour under the trade-mark, Golden Bake.

3. Golden Bake was an associate or secondary brand which was sold for defendant's convenience where particular circumstances made such sales appear advisable.

4. Golden Bake is a trade-mark which is descriptive of the ingredients, qualities or characteristics of the products with which it is utilized.

5. Food package products utilizing the colors blue and yellow have been in wide and general use by others long prior to any use of these colors by defendant.

Amended by substituting the following:

5. Pancake flour package products utilizing the colors blue and yellow have been in general use by others prior to any use of these colors by defendant.

6. The use by the defendant of the colors blue and yellow on other products has not been extensive and is insufficient to cause the public to associate this color combination with the defendant.

Stricken by amendment, substituting the following:

6. Defendant's use of contiguous blue and yellow panels on Pillsbury's and Snosheen cake flour with and without red stripes or markings and on products other than Golden Bake pancake flour has been substantial and extensive for many years prior to plaintiff's advent in business.

7. The name of the defendant has been associated with Golden Bake pancake flour only to the minimum extent required by law and there is no evidence that the public recognizes or knows Golden Bake to be or to have been a product of the defendant company.

8. Golden Bake was never advertised.

9. There is no evidence that the product, Golden Bake, enjoys or has enjoyed in the minds of the public, wholesalers or jobbers any degree of good will.

10. There is no evidence that Golden Bake was ever sold in competition with any of plaintiff's products.

11. The manufacture, offering for sale, and sale of Golden Bake was discontinued in the latter part of 1942 prior to the introduction on a substantial basis, of plaintiff's product, Golden Soy.

Stricken by Court's amendment.

12. The defendant virtually discontinued the manufacture and sale of Golden Bake at the time it introduced the competitive product, Golden Bake Mix.

13. The evidence is not convincing that defendant's substantial discontinuance of the manufacture and sale of Golden Bake was due to a shortage of ingredients.

14. Plaintiff has exercised reasonable care to distinguish its Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins, trade-marks, cartons and labels from those of defendant's competitive products on the market at the time of their adoption, including defendant's Golden Bake.

15. Plaintiff's Golden Soy and Golden wheat-soy Mix and defendant's Wheat-Soy-Rice and Golden Bake Mix have been and are being offered for sale and sold to the public as specialty products having improved characteristics over ordinary pancake flour.

16. Plaintiff has wholly failed to sustain the charge in its complaint that "defendant employs in its Golden Bake Mix a second run wheat flour and also employs as a filler a substantial amount of rice flour which is a lower cost ingredient" and "the soya grits which is the soya bean ingredient used by the defendant although possessing some of the advantages of soy flake flour are coarse, unappetizing" etc.

17. Plaintiff's Golden Soy and Golden wheat-soy Mix and defendant's Wheat-Soy-Rice and Golden Bake Mix have been and are being sold to the public at a price above that at which ordinary pancake flours not containing soy flours are sold, and at twice the sale price of Golden Bake.

18. There is no evidence that anyone has been confused or deceived by any resemblance between the trade-mark or package dress and style of defendant's Golden Bake and plaintiff's Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins.

19. There is no evidence that any of plaintiff's products have been passed off as defendant's Golden Bake.

20. There is no evidence that defendant has suffered any damage in its business and good will in Golden Bake by reason of the sale by plaintiff of Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins.

21. Plaintiff has not been guilty of unfair competition toward defendant in its advertisement, offering for sale and sale of its products, Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins.

22. Defendant is the owner of label Registrations Nos. 48,005, 52,258, 52,874, 53,922, 42,180, KK 8635 and KK 22,293 for its Snosheen, Minitmix, Golden Bake and Golden Bake Mix labels. None of said registrations has been infringed by plaintiff's Golden Soy, Golden wheat-soy Mix or Golden Mix for muffins labels or any of them.

23. The defendant has been guilty of inequitable conduct toward the plaintiff prior to and at the time of the filing of its counterclaim, which inequitable conduct was directly associated with the subject matter of its alleged cause of action. Said inequitable conduct consisted of the change of its carton label and trade-mark for a soy pancake flour from the non-confusing Wheat-Soy-Rice to the confusing Golden Bake Mix, with knowledge of plaintiff's products and rights.

Court's Conclusions of Law

Bill of Complaint

1. The plaintiff, Soy Food Mills, Inc., is a corporation organized and existing under the laws of the State of Illinois and has its principal place of business in the City of Chicago, State of Illinois.

2. The defendant and counterclaimant, Pillsbury Flour Mills Company, is a corporation organized and existing under the laws of the State of Delaware and has its principal place of business in the City of Minneapolis, State of Minnesota.

3. Plaintiff, Soy Food Mills, Inc., is the possessor of a valuable good will in and to its trademarks Golden Soy, Golden wheat-soy Mix, in and to the original dress and style of the carton labels under which its pancake flour product is sold and in and to the business which it has established in this product.

4. Defendant, Pillsbury Flour Mills Company, has been guilty of unfair competition in creating a state of public confusion and deception between its product Golden Bake Mix and plaintiffs product Golden Soy and Golden wheat-soy Mix and in passing off its product as that of plaintiff.

5. Defendant's conduct has been deliberate and with knowledge of plaintiff's rights.

6. Plaintiff's label copyright Registration No. 21789 is a good and valid label copyright and has been infringed by the defendant.

7. Plaintiff has not been guilty of unclean hands prior to or at the time of the filing of the bill of complaint herein.

8. Plaintiff, Soy Food Mills, Inc., is entitled to the injunctive relief, accounting for profits and damages and costs as prayed for in the bill of complaint.

CONCLUSIONS OF LAW

Counterclaim

1. Defendant's trade-mark Golden Bake for pancake flour is a descriptive trademark and its registration under the Trade-Mark Act of 1905 is invalid.

2. Plaintiff, Soy Food Mills, Inc., has not infringed defendant's trademark Golden Bake, by the offering for sale and sale of Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins.

3. There has never been any good will associated with the business of defendant, Pillsbury Flour Mills Company, in its product, Golden Bake.

4. The defendant, Pillsbury Flour Mills Company, abandoned its business in the product Golden Bake in the latter part of 1942 and abandoned the use of the trademark and package in which the product had been packed.

Stricken by Court's amendment.

5. The defendant, Pillsbury Flour Mills Company, is not possessed of exclusive proprietary rights in the dress and style of packages for food products utilizing the colors blue and yellow.

Amended by substituting the following:

5. Defendant is not possessed of any exclusive proprietary rights in packages for soy containing pancake flour relating to the colors blue and yellow.

6. The plaintiff, Soy Food Mills, Inc., in the sale of its products, Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins has not been guilty of unfair competition toward defendant.

7. The defendant's label copyright Registration Nos. 48,-005, 52,258, 52,874, 53,922, 42,180, KK 8635 and KK 22,293 are not infringed by the plaintiff.

8. The defendant has been guilty of inequitable conduct toward plaintiff prior to the filing of the bill of complaint herein which precludes it from asserting any claim against plaintiff.

9. The counterclaim and supplemental counterclaim should be dismissed at the defendant's costs.

APPENDIX "B"

In the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

No. 8996. OCTOBER TERM, 1946, APRIL SESSION, 1947.

SOY FOOD MILLS, INC.,
Plaintiff-Appellee,

vs.

PILLSBURY MILLS, INC. (Formerly By Name PILLSBURY FLOUR MILLS COMPANY).
Defendant-Counter-claimant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

April 10, 1947.

Before EVANS, SPARKS, and MINTON, *Circuit Judges.*

EVANS, *Circuit Judge.* This appeal is from a decree rendered in an unfair competition and infringement of trademark and copyright suit wherein each party sought relief from the other.

The plaintiff charged defendant with unfair competition and with the infringement of its copyright, "Golden wheat-soy Mix" and also with infringement of its copyright, "Golden Soy Griddle Cake Mix."

Defendant filed an answer and also a counterclaim. It denied the facts upon which plaintiff based its prayer for relief, and also sought affirmative relief, consisting of an injunction against plaintiff's use of its trade-mark, "Golden Bake" and from other unfair methods of competition and from advertising or attempting to sell its product as defendant's made product. It also sought an injunction to stop plaintiff's alleged infringement of defendant's registered labels and its trade-marks.

Both sides also sought damages and an accounting.

After an extended trial, the Court found in plaintiff's favor on some of its unfair competition charges and against it on certain of its other charges. It found against the defendant on all of the material and controverted charges set forth in its counterclaim.

The importance of accuracy justifies our setting forth in *haec verba*, the terms of the decree. We quote therefrom.*

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* "* * it is

"Ordered, adjudged and decreed as follows:

"(1) That a writ of perpetual injunction issue herein strictly enjoining and restraining * defendant, Pillsbury Mills, Inc., * * and all in privity with it from (a) offering for sale and/or selling to the public a pancake, waffle and/or muffin flour blend containing a Soybean ingredient under the trade-mark Golden Bake Mix or any other trade-mark which is a colorable imitation or close simulation of plaintiff's trade-marks, Golden wheat-soy Mix and Golden Mix, except that nothing herein contained shall prevent defendant from using the trade-mark Golden Bake;

"(b) offering for sale and/or selling to the public a pancake, waffle and/or muffin flour blend containing a Soy bean ingredient packaged in a carton or other container, the exterior of which has a yellow, blue, white and red dress and style and/or one in which the respective colors and/or design elements are so arranged and disposed as to closely resemble the dress and style and arrangement and disposition of colors and/or design elements on plaintiff's Golden wheat-soy Mix package and from otherwise unfairly competing with the plaintiff in the dress and style of its package;

"(c) reproducing and publishing labels for a pancake, waffle and/or muffin flour blend in infringement of plaintiff's label copyright No. KK 21789 entitled 'Golden wheat-soy Mix';

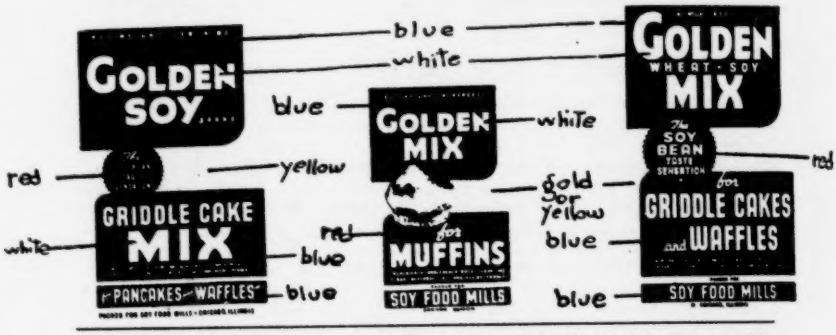
"(d) utilizing in the sale of a pancake, waffle and/or muffin flour blend containing a Soy bean ingredient the slogan 'The New Soy Taste Sensation,' or any other slogan which is a colorable imitation or close simulation of plaintiff's trade-mark slogan, 'The Soy Bean Taste Sensation.'

Both parties are engaged in selling a flour mix. The label copyrights and trade-marks involved, and the alleged unfair competition turn on the cover designs and words appearing on the cartons that carry the flour.

Reproduced herewith, is the trade-mark, Golden Soy, and trade-mark, Golden Mix and the label copyright, Golden wheat-soy Mix, all plaintiff's.

GOLDEN SOY

GOLDEN MIX



"(2) That plaintiff * * recover from defendant * * the profits and damages accruing by reason of the unfair competition of the defendant * * and the profits, damages accruing by reason of the unfair competition of the defendant * * and the profits, damages and reasonable attorneys' fees for the infringement by defendant of plaintiff's aforesaid identified label copyright. * *

"(3) That * defendant * * deliver up for computation and destruction all labels, cartons, packages, cases, signs, and other advertising matter which in whole or in part infringe plaintiff's aforesaid label copyright.

"(4) That plaintiff recover from defendant its taxable costs herein.

"(5) Plaintiff has not sustained its charge of infringement of its label copyright No. KK 18584 entitled 'Golden Soy Griddle Cake Mix' and plaintiff's complaint as to infringement of said copyright should be and the same is hereby dismissed at the plaintiff's costs.

"(6) That the defendant, Pillsbury Mills, Inc., has failed to sustain any of the charges of trade-mark infringement, unfair competition and infringement of label copyrights set up in the counterclaim and

Defendant's 1935 trade-mark is herewith reproduced and the label which it used after August, 1943 is also reproduced. The colors are of necessity eliminated.

GOLDEN BAKE

The Court made findings which it subsequently modified upon defendant's motion. These findings are controlling with us wherever there is evidence to support them, even though the evidence be strongly disputed.

Defendant argues that certain findings are wholly unsupported by evidence and must be rejected by us. It is this contention which makes this appeal so involved factually and so difficult of satisfactory statement and determination. For example, we are asked by plaintiff to accept

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supplemental counterclaim and said counterclaim and supplemental counterclaim should be and the same hereby are dismissed at the defendant's costs.

"(7) That the plaintiff has failed to sustain its charges of trade-mark infringement as distinguished from its charges of unfair competition against defendant and plaintiff's complaint as to trade-mark infringement should be and the same is hereby dismissed at the plaintiff's costs.

United States District Judge."
WALTER J. LABUY,

the Court's appraisal of the defendant's trade-mark, Golden Bake, and its denial of defendant's right to add to the words, *"Golden Bake,"* the word, *"Mix."*

It also asks us to accept the Court's finding that defendant adopted Golden Bake Mix deliberately and with knowledge of plaintiff's product and its name, Golden wheat-soy Mix. It bases its case largely on this adoption of names, which, together with the carton and label so similar to plaintiff's cartons that defendant was able to, and did, pass off its product as plaintiff's product. Its charge of unfair competition is thus established, so plaintiff argues.

Defendant, on the other hand, argues that there is no evidence, other than the labels themselves which are before the Court and which we can evaluate as well as the District Court, which supports the finding of unfair competition by defendant. The same is true of its asserted claim of protection under its trade-mark, *"Golden Bake."* It contends that there is nothing sacrosanct about a district court finding when that finding deals with a trade-mark and a trade-name. In short, this court may say, and in fact must decide, whether defendant, whose use of "Golden Bake" is clear, may not add the word, Mix, even though plaintiff used the words, "Golden wheat-soy Mix" between the date when defendant first used Golden Bake and the date when its Golden Bake Mix appeared. The evidence, so it is argued, is of equal persuasiveness in both courts. Just as a finding in the District Court is not conclusive where the evidence is by deposition—equally open to both courts—so is the question presented by the use of trade-names open to both lower and appellate courts for their separate determination as to confusing similarity.

We are of the opinion that not only is the factual question thus open to the appellate court, but it is our unavoidable duty to examine the two trade-marks or trade-names

or copyrights and decide the question of fact for ourselves. We must, however, give to the District Court's opinion on such issues, consideration and weight because of its source.

In the last analysis, our examination of the carton and of the names and the date of appearances of said cartons convinces us the controversy turns largely upon the use of the word, Golden. It is clear that the defendant's objectionable cartons and words selected by it to describe its product do not constitute a Chinese copy of plaintiff's carton or trade-mark or trade-name or advertisement. Likewise, plaintiff did not use defendant's prior chosen trade-mark, Golden Bake. On the question of unfair competition we find the colorings of cartons used by the plaintiff are not exactly similar to those used by the defendant nor were defendant's exactly similar to those used by plaintiff.

Rather important is the matter of dates. Defendant was an old manufacturer in the field. It was one of the largest pancake flour manufacturers in this country. It had been a leader in the flour business, including pancake flour, for many years—over half a century. Plaintiff appeared in the commercial field in 1942 and enlarged its business in 1943. It did not manufacture its flour but caused a flour mill to prepare its product in accordance with a formula which it submitted.

Such competition as existed between the parties arose in 1943. At this time the country was at war and conservation of flour was a government objective. This was accomplished in part by the introduction of soy bean flour into the pancake flour mixes.

Plaintiff insists, that its formula has great merit. The Court's finding in respect thereto is conclusive. We accept it.

Soybean, as an addition to the wheat or other flour used in pancake or muffin flour, while not new in 1942, became

a more important factor during these war years. Whether the public was moved by patriotic sentiment or a fondness for soy flour in pancake mixes is immaterial. It was an ingredient which both companies could use and in the proportion which each chose. The more used, the better the Government liked it. Plaintiff's percentage of soy flour was relatively small. Defendant used as much as twenty percent in its pancake flour mix.

Plaintiff was not the first to use soy bean flour in pancake flour nor did it precede the defendant in its use in this field. There were also other pancake flour manufacturers who made a pancake mix with soybean additions, prior to 1942.

Over-emphasis has been given to the contents of the mix, so we think. The controversy is over the words of the trademarks, to-gether with the colors which appear on the cartons in which the mix was sold. The litigation is over the use of pancake flour mix *packages. It is not over the pancake flour.*

It is important to bear in mind that pancake flour *mix* may have ingredients other than soy bean flour. The word, Mix, indicates merely that it is not a straight wheat flour, or buckwheat flour, or rice flour, but has an additional ingredient.

Defendant contends that plaintiff has been guilty of unethical conduct aside from its unfair competition which must preclude it from obtaining any affirmative relief in a court of equity. In other words, plaintiff's hands are not clean.

It asserts first, that plaintiff used the word, Mills, in its name (Soy Food Mills, Inc.) to inform the public falsely that it made its own product whereas it never made any of its product but purchased its mix from a flour mill which made the product for it.

Second, defendant argues that the United States Government instituted a libel against the plaintiff's pancake flour, charging the use of false and deceiving advertising matter on the cartons containing its pancake flour mix, and obtained a decree enjoining plaintiff from selling its product in such cartons because said cartons carried false and deceptive advertisements and because plaintiff falsely asserted the existence of ingredients not in its mix and attributed to its product virtues which were untrue. The court, later, permitted plaintiff to sell its products in cartons with the objectionable advertisements eliminated, but only under the supervision of the "Food and Drug Administration, Federal Security Agency" and upon plaintiff's paying the "transportation, salary and such other necessary expenses" "incurred by the Administration in connection with said surpervision." This concession by the government to the plaintiff was due to the government's desire to avoid the loss of any wheat flour.

In the development of its trade-mark and trade-name, plaintiff first used Golden Soy. It used this label on its cartons. It neglected to publish notice of such copyright on 1,000,000 of its cartons. Defendant argues that plaintiff lost its copyright thereby and in legal effect dedicated it to the public. *Thompson* v. *Hubbard*, 131 U. S. 150, 151. Defendant, however, goes further and contends that plaintiff could regain its rights thus lost by failure to give notice to the public, by securing another trade-mark covering the same subject. It relies on *Universal Film* v. *Copperman*, 218 F. 577 and *Sieff* v. *Cont. Auto Supply, Inc.*, 39 F. 2d. 683, in addition to the *Thompson* v. *Hubbard* case, *supra*.

The Court made twenty-three separate findings each of which specifically negatived the defendant's contention respecting its product and sustained the plaintiff's view as to the validity of its claim of the unfair competitive methods

by the defendant. It also made eight conclusions of law respecting the plaintiff's claim and nine conclusions respecting the defendant's counterclaim, all favorable to the plaintiff.

Subsequent to the making of said findings and conclusions the defendant submitted affidavits and asked for the modification of said findings and particularly in respect to defendant's registered trade-mark, Golden Bake, the substance of which objectionable findings were, that defendant has not been associated with Golden Bake pancake flour except to the minimum extent required by law and the public does not know or recognize Golden Bake, to have been the product of the defendant company; that it never advertised pancake flour under the name of Golden Bake, and enjoyed no good will in the mind of the public. It also found that Golden Bake was not sold in competition with plaintiff's products and that it was discontinued in the latter part of 1942, prior to the introduction of plaintiff's product, Golden Soy.

We quote from two of the Court's conclusions on defendant's counterclaim:

> "1. Defendant's trade-mark, Golden Bake for pancake flour, is a descriptive trade-mark and its registration under the Trade Mark Act of 1905 is invalid.
>
> "3. There has never been any goodwill associated with the business of defendant, Pillsbury Flour Mills Company, in its product, Golden Bake."

We also quote the following conclusions of law respecting plaintiff's trade-mark and copyright:

> "3. Plaintiff, Soy Food Mills, Inc., is the possessor of a valuable goodwill in and to its trademarks, Golden Soy, Golden wheat-soy Mix, in and to the original dress and style of the carton labels

under which its pancake flour product is sold and in and to the business which it has established in this product.

"6. Plaintiff's label copyright registration No. 21789 is a good and valid label copyright and has been infringed by the defendant."

The court made four findings which read as follows:

"11. The manufacture, offering for sale, and sale of Golden Bake was discontinued in the latter part of 1942 prior to the introduction on a substantial basis of plaintiff's product, Golden Soy.

"15. Plaintiff's Golden Soy and Golden wheat-soy Mix and defendant's Wheat-Soy-Rice and Golden Bake Mix have been and are being offered for sale and sold to the public as specialty products having improved characteristics over ordinary pancake flour.

"18. There is no evidence that anyone has been confused or deceived by any resemblance between the trade-mark or package dress and style of defendant's Golden Bake and plaintiff's Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins.

"22. Defendant is the owner of label registrations Nos. 48005, 52258, 52874, 53922, 42180, KK 8635 and KK 22293 for its Sno-Sheen, Minitmix, Golden Bake and Golden Bake Mix labels. None of said registrations has been infringed by plaintiff's Golden Soy, Golden wheat-soy Mix or Golden Mix for muffins labels or any of them."

After their entry the Court heard argument and ordered each one stricken. It also struck its previously entered conclusions of law Nos. 4 and 5, which read:

"4. Defendant, Pillsbury Flour Mills Company, has been guilty of unfair competition in creating a

state of public confusion and deception between its product, Golden Bake Mix, and plaintiff's products, Golden Soy and Golden wheat-soy Mix, and in passing off its product as that of plaintiff.

"5. Defendant's conduct has been deliberate and with knowledge of plaintiff's rights."

It did not, however, strike either conclusions of law No. 1 or No. 3 which it entered on defendant's counterclaim.

Defendant argues that these modifications and changes in the findings were made necessary because of the total absence of evidence to support them. Plaintiff, however, contends that though the finding was stricken respecting Golden Bake, the Court did not change certain conclusions which were based on the said findings before they were stricken or changed. This the defendant contends was an oversight on the part of the Court. In other words, in striking out the findings the Court overlooked the fact that it had inserted conclusions inconsistent with its action striking the findings.

We are satisfied that where a finding is stricken when the court's attention is directed specifically to it, the retention of a conclusion based thereon, was an oversight or an error. The conclusion must be ignored unless other findings support it.

Two questions, both of which might well be said to be vexatious, intrude themselves into our consideration of the case: (a) why did plaintiff adopt the word, Golden, and simulate defendant's use of the same word in the trade-mark "Golden Bake." We have found no satisfactory reason. Defendant had been using its trade-mark for six years. It was duly registered. It could not fairly be said to be descriptive of the product, although the pancake may suggest the appropriateness of the word, golden. If descriptive, it would be equally offensive and objectionable, in plaintiff's

as in defendant's name. Its prominence and location are the same in plaintiff's as in defendant's trade-mark.

(b) The other query arises out of defendant's use of the word, Mix. Why did it use this word? It offers an excuse which is not unreasonable. It points to the action of the Millers Association following the ruling of the U. S. Food and Drug Administration. It distinguished the p duct more specifically from a flour made up entirely of wheat. Moreover, in two prior instances, one of which appeared as early as 1933, it used the word, Mix, on its cartons.

It is sufficient to observe that if the term, Golden Bake, is an invalid trade-mark because it is purely descriptive, the same applies with equal effect to plaintiff's copyright "Golden wheat-soy Mix."

Golden Bake was the trade-mark name which defendant selected and registered in October, 1935. It was the name used continuously thereafter. It applied to pancake flour which contained soy bean flour or to any other ingredient so used. As to this the evidence is conclusive.

Defendant, however, changed the name it used on the cover of the carton containing its pancake flour, in 1943, by adding the word, Mix. The words which plaintiff argues infringes its label copyright, "Golden wheat-soy Mix," were "Golden Bake Mix."

Plaintiff contends that the addition of the word, Mix, occurred as a result of action taken by the United States Food and Drug Administration, which in 1941, gave standards of identity for wheat flour and related products. It, however, did not include in its order any definition of pancake flour. As a result, the mills of the United States, making flour, concluded that when pancake flour with another ingredient like soybean flour added, was made and sold there should be added the word, Mix, to distinguish it from straight flour. This action was taken by the millers belonging to the Mil-

lers National Federation of the United States in December, 1943. Defendant added the word, Mix, shortly thereafter.

With this preliminary statement of facts we now take up, in the order of the decree, the various provisions so far as said decree runs against the defendant.

(a) The Court in said decree first restrained defendant from selling to the public a pancake or waffle or muffin flour blend under a trade-mark, Golden Bake Mix or to use any other trade-mark which is a colorable imitation of or a close similitude to plaintiff's copyright, Golden wheat-soy Mix and trade-mark, Golden Mix.

We are of the opinion that on the showing made, this part of the decree must fall for several reasons. (a) The words, Golden Bake Mix, must be read in connection with the word, "Pillsbury's" appearing in large letters on the top line, above the words, Golden Bake Mix.

A second reason for our conclusion is to be found in the fact that defendant had the right to use its valid trade-mark, Golden Bake. The addition of the word, Pillsbury's, at the top of this trade-mark and the addition of the word, Mix, at the end of said trade-mark, were a legitimate extension of defendant's use of its said legal trade-mark and of its rights arising therefrom.

A third reason for this conclusion, is the fact that if there be confusion in the two carton covers, either in color effect or the use of words or both, said confusion is due to plaintiff's adoption of defendant's trade-mark with which it was in alleged confusing competition as to the colors, because plaintiff took defendant's prior use of blue and yellow background and built thereon. We are not prepared to give defendant any domination over a competitor through its use of these two colors—or in their position on the carton cover. Yet, it is clear if we were to give to either party any dom-

inance over the other, we would be compelled to give defendant the preference because of its prior use.

Finally, as to the use of the word, Mix, which was used by plaintiff in its exhibit 16 and exhibit 11, and which appeared on the market on its products in June, 1943 and in August, 1943, defendant has this to say (and we accept it). It followed the ruling of the Pure Food and Drug Administration on sales of flour, and the action of the Millers Association based thereon. Moreover, defendant caused hundreds of thousands of test packages to be distributed throughout the country to ascertain the public's reaction to its product. This was before either of plaintiff's exhibits 16 or 11 appeared. In other words, defendant was the first to use the word, Mix. These packages appeared in February, 1943. The word, Mix, also appeared ten years previous, on defendant's product, "Pillsbury's Minitmix."

(b) The decree also enjoined defendant from selling pancake flour containing a soybean ingredient packaged in a container the exterior of which has a yellow, blue, white dress and style so arranged as to resemble the dress and style of colors on plaintiff's Golden wheat-soy Mix package and from otherwise unfairly competing with plaintiff in the dress and style of plaintiff's package.

An examination of the cartons leaves us entirely cold to the argument that there was unfair competition manifested by defendant's dress as against the plaintiff's dress. There are so many exhibits showing varieties of colors and locations of colors on the cartons that it is quite impossible to reproduce them all. It is sufficient to say on this issue of unfair competitive practices, based on color and designs, that on the top of defendant's carton, the word, Pillsbury's, was printed in a color different from the words, Golden Bake Mix. The word, Pillsbury's, has a yellow background, and the type is large and its position makes it likely to catch

the eye of the customer. The second color across the side of the carton is blue. On this blue background appear the words, Golden Bake Mix. The letters of the word, Mix, are smaller than those used in the words, Golden Bake. On the face of this carton, near the bottom, are written the words, "For Pancakes, Waffles, Muffins."

From 1935 to date of this litigation, defendant used a blue and yellow background for its trade-mark or trade name. It did not materially change the relative position of this background coloring until 1943 when it used yellow at the top across the side of the carton. Upon it was printed the word, "Pillsbury's." Then there was a large blue background below the yellow. Below the yellow and about two-thirds of the way down, the background was yellow.

Plaintiff's carton cover colors are primarily blue and yellow. At the top of the carton are printed the words, Golden wheat-soy Mix on a blue background and below the yellow background there is another, a blue background, containing the words, "For Griddle Cakes, Waffles."

The word, Golden, constitutes one line. It is in bold, large print. The words, wheat-soy, are very small. But the word, Mix, on the line below the line carrying the words, "wheat-soy", is in large letters—as large as the letters in the word, Golden.

Between the two blue backgrounds is a circular red colored seal upon which are written the words, "The Soy Bean Taste Sensation." These words were not used by defendant on its carton. Nor is there any seal-like circle. Defendant does have a thin bar of red across the lower yellow background on which appear the words, "with 20% soy."

The words printed on the carton are as important as selection of the colors or the color order.

In attempting to appraise properly the situation disclosed by this record, we are impressed by the fact that unfair

competition and trade-mark and copyright infringements do, in the last analysis, involve very similar issues. They are phases of over-zealous competition or they evidence a lack of ethical ideals in business transactions which call for judicial correction. In fact, it has been declared that trade-mark law is but a part of the broader field of the law of unfair competition.

It is not unusual in the course of a trial where much feeling and heat are engendered, and the disputes are irreconcilable that a few salient and vital facts are clearly established, and they point the way to the correct answer to the charges involved. The present suit is no exception to the rule. The facts which are somewhat determinative and which are conclusively established are:

(a) The plaintiff out of the numberless words it could have chosen, selected in the word, Golden, which it found already appropriated in this identical field, by the defendant. The Patent Office gave plaintiff notice that defendant, years before, had selected as the first word of its registered trade-mark. the word, Golden. That the word, Golden, as one of a trade-mark name is not merely descriptive, has been held in many courts. (*Fairbanks Co.* v. *Luckel, Soap Co.*, 102 F. 327; *Fairbanks Co.* v. *Ball Mfg. Co.*, 77 F 869; *Fla. Fruit Canners, Inc.* v. *Atlantic Sea Food Packers*, 69 U. S. P Q 177; *Lowney Co.* v. *Chandler Co.*, 12 F. 2d 189; *California Packing Corp.* v. *Halferty*, 295 F. 229; *Pontefact* v. *Isenberger*, 106 F. 499.)

We have been unable to find any satisfactory explanation of plaintiff's selection of this word. At least its choice is more consistent with a desire to get into volume business regardless of the methods adopted, than it evidences a good faith effort to select a distinctive name under which to sell its products.

(b) The other striking fact which refutes plaintiff's allegations appearing in its sworn complaint that defendant was making an inferior product and palming it off as plaintiff's is defendant's conspicuous use of the word, "Pillsbury's" at the top of its carton. Its use not only completely refuted the charge that it was trying to sell its products as plaintiff's but it was most persuasive evidence that its purpose was just the opposite. It leaves no room for doubt as to defendant's motives and its good faith.

(c) In selecting its colors, though deviating somewhat in their order, plaintiff chose to make use of two colors for use as the background of its carton advertisements. One major color was blue. The other was yellow. On these two colors it printed its copyright words. It began with the word, Golden, which was carried in larger type.

In selecting blue and yellow, plaintiff must have known that such were the long used colors of defendant. Not that defendant had a monopoly on their use, but if confusion were to result, it was apparent that it must come from the use of the word, Golden, and the use of the similar colors, yellow and blue. Both practices must be charged to plaintiff.

Without greater elaboration of our views we state our conclusions which are:

(1) We are convinced that there was no unfair competition by either party.

(2) We need not determine the validity of defendant's trade-mark, Golden Bake, because we do not believe it was infringed by plaintiff's carton containing the words, Golden wheat-soy Mix.

(3) The coloring of the cartons as well as the other words appearing thereon do not justify a finding of unfair competition by either party.

(4) Defendant's carton containing the words, "Pillsbury's" "Golden Bake Mix" does not infringe plaintiff's copyright, "Golden wheat-soy Mix."

(5) The coloring of the cover of the cartons, together with the words appearing thereon, do not make out a case of infringement by defendant of plaintiff's copyright.

The decree of the district court must be, and is, reversed, with directions to dismiss the plaintiff's complaint and also the defendant's counterclaim.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

APPENDIX "C"

ENUMERATION AND DISCUSSION OF THE FACT ERRORS IN THE OPINION OF THE CIRCUIT COURT OF APPEALS.

We seriously question whether there has even been a reported decision from a Circuit Court of Appeals in which the opinion contained so many outright misstatements of fact. Judge Evans' opinion is predicated on an almost complete misconception of the controlling facts of the case.

In Appendix "B" we have reproduced the Opinion and have indicated in red ink the portions which are completely erroneous or which relate to matters which were not in evidence and could not have been considered by the Court. We have divided these errors into two classes, the first of which we will call "major errors." The major errors all relate to matters which go to the very essence of the case. A correction of any one of them should have been sufficient to bring about a different result. Had these errors not been made, it is inconceivable that the Court would have reached the conclusions which it did. We have also noted a considerable number of "minor errors." Each of these is of measured importance and the cumulation of them is striking.

MAJOR ERRORS

The major errors are as follows:

(A) On pages 8 and 9 of the Opinion (*supra*, pp. 55-6) the following appears:

> "The Court made four findings which read as follows:
>
> "'11. The manufacture, offering for sale, and sale of GOLDEN BAKE was discontinued in the latter

part of 1942 prior to the introduction on a substantial basis of plaintiff's product GOLDEN SOY.

"'15. Plaintiff's GOLDEN SOY and GOLDEN Wheat-Soy MIX and defendant's WHEAT-SOY-RICE and GOLDEN BAKE MIX have been and are being offered for sale and sold to the public as specialty products having improved characteristics over ordinary pancake flour.

"'18. There is no evidence that anyone has been confused or deceived by any resemblance between the trade mark or package dress and style of defendant's GOLDEN BAKE and plaintiff's GOLDEN SOY, GOLDEN Wheat-Soy MIX and GOLDEN MIX for muffins.

"'22. Defendant is the owner of label registrations Nos. 48005, 52258, 52874, 53922, 42180, KK 8635, and KK 22293 for its SNO-SHEEN, MINITMIX, GOLDEN BAKE and GOLDEN BAKE MIX labels. None of said registrations has been infringed by plaintiff's GOLDEN SOY, GOLDEN Wheat-Soy MIX or GOLDEN MIX for muffins, labels or any of them.'

"After their entry the Court heard argument and ordered each one stricken. It also struck its previously entered conclusions of law Nos. 4 and 5, which read:

"'4. Defendant, Pillsbury Flour Mills Company, has been guilty of unfair competition in creating a state of public confusion and deception between its product, GOLDEN BAKE MIX, and plaintiff's products, GOLDEN SOY and GOLDEN Wheat-Soy MIX, and in passing off its product as that of plaintiff.

"'5. Defendant's conduct has been deliberate and with knowledge of plaintiff's rights.'

"It did not, however, strike either conclusions of law No. 1 or No. 3 which it entered on defendant's counterclaim.

"Defendant argues that these modifications and

changes in the findings were made necessary because of the total absence of evidence to support them. Plaintiff, however, contends that though the finding was stricken respecting GOLDEN BAKE, the Court did not change certain conclusions which were based on the said findings before they were stricken or changed. This the defendant contends was an oversight on the part of the Court. In other words, in striking out the findings the Court overlooked the fact that it had inserted conclusions inconsistent with its action striking the findings.

"We are satisfied that where a finding is stricken when the Court's attention is directed specifically to it, the retention of a conclusion based thereon, was an oversight or an error. The conclusion must be ignored unless other findings support it."

Every single statement in the portion of the Opinion above quoted is absolutely incorrect, except that, as stated in the first paragraph quoted, finding No. 11 of the Counterclaim was stricken on rehearing. However, the Opinion neglects to state that finding No. 12 was left in, although vigorously attacked at the re-hearing. Finding No. 12 reads as follows:

"The defendant virtually discontinued the manufacture and sale of GOLDEN BAKE at the time it introduced the competitive product, GOLDEN BAKE MIX."

Findings 15, 18, and 22 of the Counterclaim, as quoted in the Opinion, were not stricken; nor were conclusions of law 4 and 5 of the Complaint. What was stricken were Findings of Fact 15, 18, and 22 of the *Complaint* which read as follows:

"15. Prior to its introduction of GOLDEN BAKE MIX in September, 1943, defendant had never previously used a label color scheme comprising the colors blue, yellow, red, and white.

"18. Plaintiff has proved that GOLDEN BAKE MIX has been and is being passed off as plaintiff's product.

"22. Plaintiff is the owner of label copyright registration No. 21,789 for its GOLDEN Wheat-Soy MIX label. This copyright registration has been and is being infringed by defendant's GOLDEN BAKE MIX label."

Of the above findings, 15 was stricken on plaintiff's own motion because technically it ignored the Pillsbury Whirligig label, plaintiff's Exhibit No. 32.

Finding 18 apparently was stricken because of the statement which it contains as to proof of actual passing off because the court left in Findings of Fact—Bill of Complaint 17 and 19 which read as follows:

"17. Deceptive similarity and confusion is admitted by both parties between the packages of defendant's GOLDEN BAKE MIX and plaintiff's packages of GOLDEN SOY and GOLDEN Wheat-Soy MIX.

"19. Defendant has been guilty of unfair competition toward plaintiff in the advertisement, offering for sale and sale of its product GOLDEN BAKE MIX continually from the date of its introduction to the present day."

The striking of Finding of Fact 22 was probably an inadvertence on the part of the District Court because it was stipulated at the trial that plaintiff did own the particular label copyright registration. On the question of infringement of this registration, Judge LaBuy evidently felt that a finding as to infringement was a Conclusion of Law because he left in Conclusion of Law—Bill of Complaint 6 which reads as follows:

"6. Plaintiff's label copyright registration No. 21789 is a good and valid copyright and has been infringed by the defendant."

It is obvious that the Circuit Court of Appeals committed a most serious error. We repeat herewith Conclusions of Law 4 and 5 of the Complaint which the Court stated were stricken, *but which actually were not*:

"4. Defendant, Pillsbury Flour Mills Co., has been guilty of unfair competition in creating a state of public confusion and deception between its product GOLDEN BAKE MIX and plaintiff's product GOLDEN SOY and GOLDEN Wheat-Soy MIX and in passing off its product as that of plaintiff.

"5. Defendant's conduct has been deliberate and with knowledge of plaintiff's rights."

Each of the above conclusions was amply supported in the Findings of Fact; Conclusion 4, by Findings of Fact—Bill of Complaint 5, 11, 12, 13, 14, 16, 17, 19 and 20, and Conclusion 5 by Findings of Fact—Bill of Complaint 10 with which it is substantially identical. Had the Court not made this very grave error, it is very apparent that it could not have reached the ultimate conclusion that Pillsbury was not guilty of unfair competition.

(B) The second serious error is on Page 6 of the Opinion (*supra*, p. 52) where it is stated:

"Plaintiff was not the first to use soy bean flour in pancake flour *nor did it precede the defendant in its use in this field.*" (Emphasis supplied)

The latter half of the above statement is absolutely incorrect. Petitioner's GOLDEN SOY was admittedly introduced in November, 1942. Respondent's first soy pancake

flour product, Pillsbury's WHEAT SOY RICE, was not introduced until February, 1943, or almost three months later. There was some evidence as to experiments with soy flour in the Pillsbury laboratory prior to this time (R. 623-625), but surely these cannot be considered in appraising the commercial situation.

This error is quite serious because it is a fact testified to by several witnesses that *GOLDEN SOY was the first pancake flour which was advertised and sold on the basis of its soy content* (R. 279, 710-11). In effect, GOLDEN SOY was the pioneer in a branch or division of the pancake flour business, and its lead was followed by the Respondent Pillsbury, by Quaker Oats, owner of the AUNT JEMIMA brand and a number of smaller concerns. These later users of soy flour did not simply add it to their mix. They brought out entirely new packages which featured soy pancake flour as "new" and "sensational." Because Petitioner was the actual pioneer in the field, Pillsbury's imitation of the GOLDEN SOY and GOLDEN Wheat-Soy MIX packages created more confusion and was less excusable than would otherwise be the case.

(C) On Page 12 of the Opinion (*supra*, p. 59) it is stated:

> "Moreover, defendant caused hundreds of thousands of test packages to be distributed throughout the country to ascertain the public's reaction to its product. This was before either of plaintiff's exhibits 16 or 11 appeared. *In other words, defendant was the first to use the word "MIX."* (Emphasis supplied)

The above statement is a flagrant error of fact. The "hundreds of thousands of test packages" referred to are evidently Pillsbury's WHEAT-SOY-RICE. This was admitted to be the first package on which Pillsbury had ever

used the word "MIX" (R. 375). It appeared in February, 1943, *but GOLDEN SOY appeared in November, 1942*, and the word "MIX" is about the most prominent word on the GOLDEN SOY package as will be noted from the cut reprints reproduced in the Opinion.

This is a most significant mistake because Pillsbury's imitation of Petitioner's cartons in its use of "MIX" as a part of the trade mark is one of the most striking elements in the case.

(D) On Page 10 of the Opinion (*supra*, p. 57) the following appears:

> "The other query arises out of defendant's use of the word, MIX. Why did it use this word? It offers an excuse which is not unreasonable. It points to the action of the Millers Association following the ruling of the U. S. Food & Drug Administration. It distinguishes the product more specically from a flour made up entirely of wheat. Moreover, in two prior instances, one of which appeared as early as 1933, it used the word, MIX, on its cartons."

This thought is further developed at the bottom of page 10 (*supra*, p. 57) and top of page 11 (*supra*, p. 58) where it is stated:

> "Plaintiff (this should be defendant) contends that the addition of the word, MIX, occurred as a result of action taken by the United States Food & Drug Administration, which in 1941, gave standards of identity for wheat flour and related products. It, however, did not include in its order any definition of pancake flour. As a result, the mills of the United States, making flour, concluded that when pancake flour with another ingredient like soybean flour added, was made and sold there should be added the word, MIX, to distinguish it from straight flour. This action was taken by the millers

belonging to the Millers National Federation of the United States in December, 1943. Defendant added the word, MIX, shortly thereafter." (Parenthetical insert supplied)

Finally the same thought is again stated on the bottom of page 11 (*supra* p. 59) and top of page 12 (*supra*, p. 59) as follows:

"Finally, as to the use of the word, MIX, which was used by plaintiff in its exhibit 16 and exhibit 11, and which appeared on the market in its products in June, 1943, and in August, 1943, defendant has this to say (and we accept it). It followed the ruling of the Pure Food and Drug Administration on sales of flour, and the action of the Millers Association based thereon."

It is apparent from this constant repetition that the action of the United States Food & Drug Administration and the Millers National Federation were considered very significant by the court and controlled its decision on this issue. *Here are the facts*:

There was not a scintilla of evidence in the case as to any action by the United States Food & Drug Administration. Respondent did try to bring this out through Mr. Files, its executive Vice-President, but Mr. Files testified in substance that he was not posted about it (R. 377). In its brief before the Circuit Court of Appeals Respondent reproduced the order and asked the Court to take judicial notice of it. It is respectfully submitted that this was entirely improper, particularly at such a late date in the case and after Respondent had attempted to prove the existence of the order in another way. However, the order was of no significance because admittedly it did not include a definition of pancake flour.

Respondent attempted to supply this deficiency by asking the court to take judicial notice of the action of the Millers

National Federation in December, 1943. *This action was almost a year after Pillsbury first started to use the word "MIX" on Pillsbury WHEAT-SOY-RICE, four monthe after it used it on GOLDEN BAKE MIX, and three months after the Complaint in this case was filed.* How could the Court come to the conclusion that it was the action of the Millers National Federation which caused Pillsbury to use the word "MIX" when that action was not taken until long after the use began?

If the Circuit Court of Appeals intended to take judicial notice of the action of the Millers Association, it was certainly most unfair to Petitioner because legal proof of such an action would have opened up wide avenues of rebuttal as to the significance of such actions and the extent to which they are followed. In its most recent pancake flour package, plaintiff's Exhibit No. 24, Pillsbury does not use the word "MIX" at all. This package came out in September, 1944, which was nine months *after the action by the Millers Association.* It is a blend of wheat flour, rice flour, and other ingredients, and it is the *only* pancake flour which Pillsbury is selling on a large scale at the present time.

MINOR ERRORS

The following are the more important of the minor errors in the Opinion:

(A) On page 3 (*supra*, p. 48) the Opinion states:

> "Reproduced herewith, is the trade-mark, GOLDEN SOY, and trade-mark, GOLDEN MIX and the *label copyright*, GOLDEN Wheat-Soy MIX, all plaintiff's." (Emphasis supplied.)

What is reproduced as a "label copyright" is the face of plaintiff's GOLDEN Wheat-Soy MIX carton. *This is not Petitioner's label copyright.* A label copyright embraces the

entire label—face, back, sides, top, and bottom. It includes the wording, the color design, the arrangement of panels, and the cuts. It is not, in any sense, limited to the trade mark words GOLDEN Wheat-Soy MIX as Judge Evans seems to think, and in fact these words are not even a part of the copyright.

(B) It is very clear that Judge Evans was completely confused as to the nature of label copyrights because on page 10 (*supra*, p. 57) the Opinion states:

> "The *words* which plaintiff argues infringes its label copyright, 'GOLDEN Wheat-Soy MIX,' were 'GOLDEN BAKE MIX'." (Emphasis supplied.)

Petitioner charged infringement of its label copyright on the GOLDEN Wheat-Soy MIX *label* by the GOLDEN BAKE MIX *label*. This charge was predicated on an imitation of the color design, the panel arrangement, and particularly on the design and type arrangement on the back of the carton. Petitioner never charged that its label copyright was infringed solely by the use of the *words* GOLDEN BAKE MIX, and concedes that a label copyright cannot be infringed by trade mark words alone.

(C) The Opinion also indicates a judicial uncertainty as to the nature of trade marks and the distinction between trade marks and copyrights. On page 7 (*supra*, p. 55) it is stated:

> "Defendant, however, goes further and contends that plaintiff could not regain its rights thus lost by a failure to give notice to the public, by securing another *trade-mark* covering the same subject." (Emphasis supplied.)

At this point in the Opinion, the Court was discussing label copyrights and the effect of failure to give copyright notice. The incorrect use of the word "trade mark" might

be considered an inadvertence except that it is an error of a type which occurs so many times in the Opinion.

(D) A similar error appears on page 10 (*supra*, p. 57 where it is stated:

> "It is sufficient to observe that if the term, GOLDEN BAKE, is an invalid trade mark because it is purely descriptive, the same applies with equal effect to plaintiff's *copyright* 'GOLDEN Wheat-Soy MIX'." (Emphasis supplied.)

Here again there is room for doubt as to whether the Court was talking about trade marks or copyrights. Petitioner is the owner of the trade mark GOLDEN Wheat-Soy MIX and is also the owner of a label copyright registration on its label for this product. Both were in suit in the case. It would seem that the Court was talking about trade marks in the portion of the Opinion just quoted but there is no way of being certain about it. Incidentally, Petitioner has never denied that its trade mark GOLDEN Wheat-Soy MIX is a descriptive trade mark.

(E) At several points, Respondent's trade mark GOLDEN BAKE and the registration therefor are discussed. For example, on page 10 (*supra*, p. 56) it is stated:

> "Defendant had been using its trade-mark for six years. It was duly registered."

Two paragraphs later it is stated:

> "GOLDEN BAKE was the trade-mark name which defendant selected and registered in October, 1935. It was the name used continuously thereafter. It applied to pancake flour which contained soy bean flour or to any other ingredient so used. As to this the evidence is conclusive."

The facts are that Respondent registered the trade mark GOLDEN BAKE in October, 1935, for *wheat flour*. It was never registered for any kind of pancake flour and (except as incorporated in GOLDEN BAKE MIX) was never *used* for any pancake flour containing soy bean flour. There was no evidence whatsoever that Petitioner had ever heard of this trade mark at the time it introduced GOLDEN SOY, and in fact there is affirmative evidence that it had not heard of it (R. 183). There are over 90 trade mark registrations for wheat flour including several for pancake flour in which the first word is GOLDEN. These are collected in book form as plaintiff's Exhibit No. 34. If the Court was aware of this exhibit, it certainly failed to consider it in its Opinion.

(F) On page 7 (*supra*, p. 53) it is stated that the United States Government

> "obtained a decree enjoining plaintiff from selling its product in such cartons because said cartons carried false and deceptive advertisements"

and

> "*because plaintiff falsely asserted the existence of ingredients not in its mix*" (Emphasis supplied.)

The above statements are absolutely untrue. The Government never contended at any time that Petitioner falsely asserted the existence of ingredients not in its mix but only that an undue emphasis was placed on the soy content (see defendant's Exhibit JJ).

(G) It is next stated that

> "The court, later, permitted plaintiff to sell its products in cartons with the objectionable advertisements eliminated, but *only under the supervi-*

sion of the 'Food and Drug Administration, Federal Security Agency'." (Emphasis supplied.)

The above statement would be true if it were limited to the 1559 cases which were seized in the libel proceedings, but as written, it is applied to Petitioner's entire business, and evidently the Court intended so to apply it. As applied to Petitioner's entire business, the statement is not only untrue in fact but highly damaging to Petitioner in an official court record such as this Opinion.

(H) A few lines farther on the Opinion states:

"This concession by the government to the plaintiff was due to the government's desire to avoid the loss of any wheat flour."

There is not an iota of evidence with respect to this, and the statement is untrue. The "concession by the Government" was because the whole proceedings were strictly technical in character, and the technicalities were cleared up by the re-labeling of the product. Petitioner's formula has never been changed, and there has never been any claim that Petitioner's product is not of excellent quality. Even the Circuit Court of Appeals found this at another point in its Opinion. The statement quoted has such derogatory aspects as to be almost libelous.

(I) On page 6 (*supra*, p. 52) it is stated:

"Plaintiff's percentage of soy flour was relatively small. Defendant used as much as twenty percent in its pancake flour mix."

The facts are Petitioner uses 15% (R. 82) as against the 20% used by Respondent.

The nine so-called minor errors just listed are significant for two reasons. In the first place, several of them go to very

controlling issues in the case and indicate that the Circuit Court of Appeals had a completely erroneous understanding of these issues. In the second place, the manner in which the Opinion disparages Petitioner and its products seems to indicate an animus toward Petitioner which was wholly unjustified by any evidence in the case.

The total of the errors is so extraordinary, and the subject matter to which they relate so clearly constitutes the whole core of the controversy, that we respectfully submit that this Court should grant this Petition so that the controversy may be determined by a tribunal free from such misunderstandings, misconceptions, and mistakes, and so that the manifest injustice which has been done to Petitioner by the errors of the Circuit Court of Appeals can be corrected.

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Petitioner's Brief (top par. p. 14), misquoted the contents of said "answer allegation" 21

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Any allegation or pleading to constitute an admission has to be construed **in its entirety** and if an offer of an admission, was **definitely contingent** upon an acceptance by Petitioner in its **entirety,** to-wit, that (a) Petitioner's packages were confusingly similar to the prior GOLDEN BAKE (pancake flour) package of Respondent's; (b) that Pillsbury's GOLDEN BAKE mix package was a legal extension of the original GOLDEN BAKE package—Petitioner **refused to accept such conditions** and doing so, may **not** claim any **benefit** from the statements as an admission of any type 22, 23

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Further, the leading authorities, make clear that there is a material distinction between **evidentiary findings** and **findings of ultimate facts** and holdings which constitute mixed findings and conclusions, regardless of how such holdings are classified by the Trial Court (citing cases) 30-32

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Outside of two or three minor inadvertencies in terminology and one immaterial error in a date, the only mistake of note in the decision of the Circuit Court of Appeals, was on the part apparently, of the Court's copyist in inadvertently copying into the decision three Findings of

Fact and two Conclusions of Law from the wrong headings ("Counterclaim," and "Bill of Complaint"), but having the same numbers as the correct holdings intended. This inadvertency is made perfectly clear by the context —It is further clear that the Court did not intend to quote the wrong Findings and Conclusions 38, 39

All controlling and determining portions of the decision of the C. C. A. including **analysis of the questions raised; reasons for conclusions** and **final conclusions,** are free from mistake or error 39

In APPENDIX B herein, the portions of the decision of the C. C. A. which are apparently **determining,** are printed in **bold face type.** The red lining used by Petitioner in its APPENDIX B is reproduced and immediately after each instance thereof (alleged by Petitioner to constitute mistake), Respondent's counsel **correctly comment** on the circumstances and **correctly identify the facts and proofs thereof** 39

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Supreme Court of the United States

No. 202

OCTOBER TERM, A. D. 1947

SOY FOOD MILLS, INC.,
Petitioner,

vs.

PILLSBURY MILLS, INC.,
Respondent.

BRIEF OF RESPONDENT, PILLSBURY MILLS, INC., OPPOSING PETITION OF SOY FOOD MILLS, INC., FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INTRODUCTORY REMARKS

This is an ordinary trade-mark and unfair competition case *with counterclaim,* involving the usual questions of *"confusing similarity"* between the *marks and package dress;* priority of use; and extension of use by Respondent to a slightly different variety of the same goods, *pancake mixes.* This Court has consistently and properly refused to grant Certiorari in such cases.[1]

[1]The White Tower System, Inc., v. The White Castle System, etc., Cert. Denied 302 U. S. 720 (C. C. A. Decis. 90 F. (2d) 67).
General Baking Co. v. Goldblatt, Inc., Cert. Denied 302 U. S. 732, 778 (C. C. A. Decis. 90 F. (2d) 241).
J. A. Livingston, Inc., v. Pocono, Cert. Denied 303 U. S. 637 (C. C. A. Decis. 92 F. (2d) 290).
Dutchess Underwear Co. v. Industrial Rayon Corp., Cert. Denied 303 U. S. 640 (C. C. A. Decis. 92 F. (2d) 33).
Molley Es Doll Outfitters, et al., v. Myrtle Gruelle, Cert. Denied 304 U. S. 561 (C. C. A. Decis. 94 F. (2d) 172).

(1) It asserts nothing which was of determining importance in the decision of the lower Court.

(2) It does not contend (nor could it) that the Circuit Court of Appeals rendered a decision *in conflict* with the decision of another Circuit Court of Appeals or with this Court *on the same or similar subject matter.*

(3) It does not contend (nor could it) that the lower Court decided an important question of Federal law which has *not* been but *should* be settled by this Court or *any question of general importance to the public.*

(4) The alleged mistakes of the lower Court set forth in Petitioner's Brief, which Petitioner contends "caused the lower Court to so far depart from the accepted and usual course of Judicial Proceedings, as to call for an exercise of this Court's power of supervision," are either conjectured and non-existing or in the few instances occurring, were apparently mistakes of the Court's copyist, but in any event had *no determining effect* upon the decision and judgment of the Circuit Court of Appeals.

The Petition of Soy Food Mills, Inc., for a Writ of Certiorari should be denied because:

E. I. duPont de Nemours & Co., Inc., v. Waxed Products Co., Inc., Cert. Denied 304 U. S. 575.

Morrell & Co. v. Doyle Packing Co., Cert. Denied 305 U. S. 643 (C. C. A. Decis. 97 F. (2d) 232).

7-Up Co. v. Cheer-Up Sales Co., Cert. Denied 326 U. S. 727 (C. C. A. Decis. 148 F. (2d) 909).

Time, Inc., v. Viobin Corp., Cert. Denied 317 U. S. 673 (C. C. A. Decis. 128 F. (2d) 860).

Mishawaha Rubber & Woolen Mfg. Co. v. Panther-Panco Rubber Co., Inc., Cert. Denied 67 S. Ct. 64 (C. C. A. Decis. 153 F. (2d) 662).

Eastern Wine Corp. v. G. H. Mumm Champagne, etc., Cert. Denied 323 U. S. 715 (C. C. A. Decis. 142 F. (2d) 499).

Luft Co. v. Zande Cosmetic Co., et al., Cert. Denied 323 U. S. 756 (C. C. A. Decis. 142 F. (2d) 536).

Selchow & Richter Co. v. Western Printing & Lithographing Co., Cert. Denied 323 U. S. 735 (C. C. A. Decis. 142 F. (2d) 707).

(5) The Petition and its accompanying Brief, positively fail to show how Petitioner's contentions, *if true,* could have caused any difference in the ultimate holdings, decision or judgment of the Circuit Court of Appeals.

The *determining* or *controlling* portions of the decision of the Circuit Court of Appeals below, for convenience of this Court, are printed in bold face type herein, as "APPENDIX B."

It is *significant* that Petitioner, after the decision of the Circuit Court of Appeals below, filed *no Petition for Rehearing* or Reconsideration to attempt to clarify any of the *now alleged* mistakes of fact on the part of the Circuit Court of Appeals.

It is further to be noted that Petitioner's Brief and Petition *have not* identified a *single* case *involving trademarks or unfair competition* wherein this Court has granted a Writ of Certiorari on the basis that the Court below materially departed from the accepted and usual course of Judicial Proceedings.

STATEMENT OF FACTS

Petitioner's "Summary and Statement" omits or minimizes many controlling facts; contains serious *misstatements* and attempts to *conceal the prior, established* trade-mark and package dress rights of Respondent, Pillsbury. *Clarification is essential.*

Determining Facts in Chronological Order.

For years before Petitioner's business began (Dec., 1942) Respondent, *Pillsbury,* engaged in the milling of flours and cereal mixes for seventy-five years, was the undisputed owner of the following:

(a) One of the oldest and best established PANCAKE MIX businesses in the world, including sales of millions of packages, yearly, of the famous "Pillsbury Label" pancake flour, *packaged in blue, yellow, red and white cartons.*

(b) The trade-mark GOLDEN BAKE for pancake flour and bread flour with use established since 1935 in twenty-two states and the goodwill of the business connected therewith (R. 299, 395, 593e to 593j, 528).

(c) United States trade-mark registration No. 329,356, registered October 29, 1935, for said trade-mark GOLDEN BAKE (Exh. B, R. 772, introd. 293).

(d) A distinctive *blue and yellow paneled* label and package dress for said GOLDEN BAKE pancake flour (established 1940) and for several other packaged flour products (established in the years indicated), including Pillsbury's Cake Flour (1929); SNOSHEEN (1931); and MINITMIX biscuit mix (1933), said last three products being nationally advertised (R. 294 to 298, 528, 581, 593c to 593e, 860; Exhs. C, D, E, F, R. 772 to 778; Exh. Q introd. R. 349 [phys. exh.]; Exh. OOO [phys.], Exhs. ZZZ-1 to ZZZ-6, R. 862; Exhs. RR and SS, R. 828, 829; Exh. 32 [phys.] introd. R. 566).

(e) Label copyright registration KK8635 (year 1941) for said GOLDEN BAKE label (Exh. QQ, R. 827).

(f) MINITMIX label copyright registration No. 42180 (1933) (R. 295, 298, 593d; Exh. XX, R. 833).

Prior to and at the time Petitioner's business was started (Dec., 1942) Respondent's original GOLDEN BAKE pancake flour was being sold extensively through *grocery stores* in twenty-two states; in the distinctive

blue and yellow paneled carton and label of Exhibits A (R. 772) and Q ([phys.] introd. R. 349)—(R. 393 to 395, 382 to 385, 295, 296, 593a to 593l, 593w).

In December, 1942, long after establishment of Pillsbury's aforesaid rights Petitioner's predecessor, Soy Food Mills, a partnership (not Petitioner, as incorrectly alleged, Pet's Br. p. 2)[2] began business, selling a pancake mix under the trade-mark GOLDEN SOY containing *largely wheat flour* and other common ingredients and including a small quantity of soy flour (Dr. Fearn, Pet's witness said, approximately 12%, R. 103—see also Libel Proceeding, Exh. JJ, R. 803 to 805). This product sold in grocery stores was directly competitive to Respondent's GOLDEN BAKE pancake flour.

Petitioner's GOLDEN SOY trade-mark, label and package, closely r e s e m b l e d the prior established GOLDEN BAKE packages (see Package Chart—Appendix A).

Petitioner and its predecessor never manufactured, blended or prepared *any products* themselves, although they held out to the public, by inclusion of the word "Mills" in their proprietary names that they did "mill" and manufacture.[3]

Admittedly, pancake mixes containing soy, had been sold prior to Petitioner's business and such prior sales were *not casual, sporadic or without advertising of soy taste,* as *incorrectly* stated by Petitioner (Br. p. 2), but were substantial; began in 1929; covered greater trade area than ever attained by Petitioner and were stimulated by *advertising soy taste or tang.* Executives, representing four competitive milling companies who made

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[2]Petitioner was not incorporated until June, 1943 (R. 118).

[3]Respondent contends said false representations caused Petitioner to be in violation of Sections 5 and 12 of the Federal Trade Commission Act.

these earlier soy pancake products so testified and introduced advertising copy and their earlier labels (R. 410 to 429, 436 to 444, 448 to 459; Exh. X [phys.] introd. R. 190; Exh. AA [phys.] introd. R. 190; Exh. HH, R. 801; Exhs. 29 and 30, R. 768, 769; Exhs. DDD-1 to DDD-8, R. 834; Exhs. EEE and FFF, R. 835).

The sale of Petitioner's GOLDEN SOY started in Chicago and was extended to the cities of Cincinnati, Minneapolis, St. Louis, Cleveland and New York, in the spring months of 1943 (R. 195, 196).

Prior to January, 1942, Respondent had *tested, used* and *perfected* a revised formula for pancake mix wherein soya grits (20%) were substituted for a former corn ingredient and dried skimmed milk was substituted for sugar (R. 622, 632, 646, 649, 582, 583; Exhs. MM and MM-1, R. 823 and 825 introd. 303).

In February, 1943, and during March, 1943, Respondent, Pillsbury, *marketed and consumer* tested its said revised pancake mix, in eight test cities under the descriptive name "WHEAT-SOY-RICE mix" (R. 468 to 475, 593m and 593n; Exh. III, R. 839 introd. 477). Reaction to such tests was favorable.

In March, 1943, at the instance of the Food and Drug Administration, the United States (U. S. Dist. Court—No. Dist. of Ill., Eastern Div.) took action against Petitioner's predecessor, Soy Food Mills, in a Libel Proceeding, No. 43-C-274 (Exh. JJ, R. 803), involving said GOLDEN SOY packages, the entire file and record of which case, was by reference made a part of Respondent's answer. The Court's judgment and decree issued May 21, 1943 (Exh. KK, R. 807), condemning GOLDEN SOY and sustaining the Libel in every respect and requiring discontinuance of the term "SOY" as part of

the name and further requiring Soy Food Mills to desist from several misrepresentations on the package such as "protein rich," "rich in vitamins," "muscle building," etc.

Despite said decree of May 21, 1943, Petitioner and its predecessor continued to fill orders for said GOLDEN SOY packages for *at least five months thereafter* (R. 170 and Exh. FF, R. 799, 800).

On June 9, 1943, Respondent, Pillsbury, having learned of the sale of Petitioner's GOLDEN SOY packages and believing said packages to be of confusing similarity to its prior, established GOLDEN BAKE package and trade-mark, served formal written notice of trade-mark infringement and unfair competition upon Soy Food Mills, enclosing a specimen of Respondent's GOLDEN BAKE label and identifying Pillsbury's registration (Exh. LL-1, R. 810). Petitioner, at first conciliatory, later refused to make any changes in its trademark or label, *although at the very time of receiving such notice, it was faced with the necessity of redesigning its GOLDEN SOY labels because of the decree in said Libel Proceedings.*

After said favorable market tests of its revised soy-containing pancake mix, Respondent, Pillsbury, decided to nationally market that product under its established registered trade-mark GOLDEN BAKE and under said characteristic blue and yellow label. To somewhat distinguish the new package from the original GOLDEN BAKE pancake flour, Respondent, in June, 1943, made the revisions readily observable by inspection of the two labels GOLDEN BAKE and Pillsbury's GOLDEN BAKE mix (Exhs. Q and 22—physical—see Package Chart, Appendix A). The new Pillsbury's GOLDEN

BAKE mix[4] label was designed, approved and printing of said labels ordered in June or July, 1943, and the printed labels were delivered early in August, all before Petitioner's GOLDEN wheat soy MIX labels appeared on the market (R. 312, 318, 559, 560, 593l, 593m, 582, 585, 168).

Pillsbury's GOLDEN BAKE mix package, identical with Exhibit 22 (physical) was introduced late in August, 1943, on an extended tour of the United States, by Respondent's executives, Mr. Parsons and Mr. Keith (R. 317, 318). The revised GOLDEN BAKE product was well received from the start and sold in large volume in many states and areas where the sale of Petitioner's products has never penetrated or been attempted (R. 329, 330, 593x to 593z, 594 to 596).

Petitioner's redesigned pancake mix package, GOLDEN wheat soy MIX, appeared on the market early in August, 1943. Mr. Thomas, Petitioner's president, *stated, himself,* that shipment of GOLDEN wheat soy MIX was not made until the last of July or in August, 1943 (R. 168). The ten or eleven cities wherein Petitioner's products were sold were all *within the trade area of the twenty-two states wherein Respondent's GOLDEN BAKE pancake flour* as well as its other pancake flours and other products herein identified, *had long previously been sold* (R. 299, 328, 329, 593u).

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[4]Respondent used the descriptive term "mix" instead of the previously used term "pancake flour" because:

(1) The revised product was recommended for **pancakes, waffles** and **muffins,** not **merely pancakes** (package chart APPENDIX A; Exh. H, R. Vol. I, 779, 583, 584).

(2) It contained soy grits with wheat flour and skimmed milk (R. 624, 626, 632, 323).

(3) U. S. Food and Drug Admn. May 27, 1941, adopted detailed standards of identity for wheat flour and **related products** and **specifically excluded** the identity **pancake flour** from its published order (Fed. Register, Vol. 6, No. 103, under title 21, pp. 2574 to 2584).

Respondent has continuously asserted throughout this litigation, in its pleadings (R. 10 to 13, 29 to 34) in opening and final arguments and throughout trial, that Petitioner's packages and *all of them* were *imitative* of and *confusingly similar* to Pillsbury's *prior established* GOLDEN BAKE, SNOSHEEN and MINITMIX packages and that confusion began December, 1942, when Petitioner's first packages of GOLDEN SOY reached the same grocery stores and customers who were accustomed for years prior, to purchasing Pillsbury's long established products, GOLDEN BAKE, Pillsbury Label pancake flour, SNOSHEEN and MINITMIX.

Petitioner's statements (related as accepted fact, page 4 and elsewhere in the Petition and Brief) that

> "It was admitted in the pleadings and stipulation at the trial, that *following the introduction* of GOLDEN BAKE mix, there was widespread confusion in the trade"

and the *inference intended* (that Respondent *asserted no confusion prior to introduction* of Pillsbury's GOLDEN BAKE mix), *is totally unfounded;* was attempted by Petitioner before the Circuit Court of Appeals and was *there found to have no merit.*[5] This matter will be considered in detail herein, in a section under the title "ARGUMENT."

After Pillsbury's GOLDEN BAKE mix had been on the market approximately one month and with Petitioner's revised pancake mix package, GOLDEN wheat soy MIX on the market only two or three weeks earlier, Petitioner brought this action for unfair competition, trade-mark infringement and label copyright.

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[5]See printed decision, C. C. A., p. 11, wherein the Court held "if there be confusion * * * either in color effect or * * * use of words or both, said confusion is due to plaintiff's adoption of defendant's (Pillsbury's) trademark, with which it was in alleged confusing competition."

On October 19, 1943, the Respondent, Pillsbury, filed its Answer and Counterclaim, charging Petitioner with infringement of its registered trade-mark GOLDEN BAKE; unfair competition in simulating the established mark GOLDEN BAKE and the dress and style of the established GOLDEN BAKE, SNOSHEEN and MINITMIX packages and also, label infringement of the 1941, GOLDEN BAKE registration.

The District Court's Decision.

The District Court decided and decreed in Petitioner's favor on *most* of the unfair competition charges against Respondent and held *against* Petitioner on its trade-mark infringement charge and on certain of its other charges.[6] It held against Respondent on *all* the material and controverted charges set forth in the Counterclaim.

Although all the packages and trade-marks in controversy were for *pancake mixes,* the District Court made a *wide distinction* between pancake mixes containing a small amount of soy and pancake mixes which did *not* contain soy. This is convincingly shown by the terminology of Judge LaBuy's decree (R. 905 to 907), paragraph 1, sections (a), (b) and (d), wherein the terminology—"containing a soya bean ingredient" is *always used* in defining the relief accorded. Also, see the District Court's Findings 2 and 15 under heading "Counterclaim" and Conclusion 5 under heading "Counter-

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[6]The District Court's Decree, among other things, provided: Paragraph 1, Section (a) (after granting plaintiff relief) stated: "Except that nothing herein contained shall prevent Defendant from using the trade-mark GOLDEN BAKE."

Paragraph 5 provided: "Plaintiff has not sustained its charge of infringement of its label copyright No. KK 18584 entitled GOLDEN SOY griddle cake mix * * *."

Paragraph 7 provided: "That the plaintiff has failed to sustain its charges of trade-mark infringement as distinguished from its charges of unfair competition against Defendant * * *."

claim." Respondent contends such material distinction by the District Court constituted glaring *error in law*[7] in construing the settled authorities relating to "goods of the same descriptive properties" and that such error accounted for numerous of the District Court's holdings which were reversed by the Circuit Court of Appeals.

The District Court's decision consisted only in its Findings of Fact and Conclusions of Law. *No memorandum or opinion, giving reasons or authorities, was filed.*

Following the District Court's decision, Respondent filed a motion to reopen the case for admission of certain additional evidence and for reconsideration of the Court's Findings and Conclusions thereafter. The motion was *not* for a Rehearing, as incorrectly alleged in the Petition, page 7, but was based on the District Court's very apparent error in certain Findings and Conclusions, some of which related to questions not pleaded and which arose during trial (R. 895 to 903). The motion was allowed; some additional testimony showing actual shipper's orders, sales of GOLDEN BAKE pancake flour in 1943 and showing very extensive sales of Pillsbury's product SNOSHEEN and Pillsbury Label pancake flour in the years 1939 to 1944, inclusive, was put into the case and error in the trial Court's Findings and Conclusions was argued and contested.

Thereupon, the trial Court ordered certain Findings and Conclusions stricken and modified some of the other Findings, to-wit:

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[7]The District Court's misapplication of the law relative to "goods of the same descriptive properties" is in the teeth of leading decisions relative thereto.

California Fruit Growers Exch., et al., v. Windsor Bev., et al., 118 F. (2d) 149, 152 (C. C. A. 7).

Mantle Lamp Co. v. Aladdin Mfg. Co., 78 F. (2d) 426, 428, 429 (C. C. A. 7).

Dwinnell-Wright Co. v. Nat'l Fruit Prod. Co., 129 F. (2d) 848 (C. C. A. 1).

Aunt Jemima Mills v. Rigne & Co., 247 Fed. 407 (C. C. A. 2).

The following Findings were stricken by the trial Court:

Under the Heading "Bill of Complaint"

Finding (15) Prior to its introduction of GOLDEN BAKE mix in September, 1932, Defendant had never previously used a label color scheme comprising the colors blue, yellow, red and white.

Finding (18) Plaintiff has proved that GOLDEN BAKE mix has been and is being passed off as plaintiff's product.

Finding (22) Plaintiff is the owner of label copyright registration No. 21,789 for its GOLDEN wheat soy MIX label. This copyright registration has been and is being infringed by Defendant's GOLDEN BAKE mix label.

Under the Heading "Counterclaim"

Finding (6) The use by Defendant of the colors blue and yellow on other products, has not been extensive and is insufficient to cause the public to associate this color combination with the Defendant.

Upon striking Finding (6), the Court substituted the following new Finding (6):

Finding (6) Defendant's use of contiguous blue and yellow panels on Pillsbury's and SNOSHEEN cake flour with and without red stripes or markings and on products other than GOLDEN BAKE pancake flour has been *substantial and extensive for many years prior to plaintiff's advent in business.* (Emphasis supplied.)

Finding (11) (*Stricken*) The manufacture, offering for sale, and sale of GOLDEN BAKE was discontinued in the latter part of 1942, prior to the introduction on a substantial basis of plaintiff's product GOLDEN SOY.

The following Conclusions of Law were *stricken* by the District Court, *Under the Heading "Counterclaim"*:

Concl. (4) The Defendant, Pillsbury Flour Mills Company, abandoned its business in the product GOLDEN BAKE in the latter part of 1942 and abandoned the use

of the trade-mark and package in which the product had been packed.

Concl. (5) The Defendant, Pillsbury Flour Mills Company, is not possessed of exclusive proprietary rights in the dress and style of packages for food products utilizing the colors blue and yellow.

Upon striking the previous conclusion, the Court substituted the following:

Concl. (5) Defendant is not possessed of any exclusive proprietary rights in packages for *soy-containing pancake* flour relating to the colors blue and yellow. (Emphasis supplied.)

Respondent contends that the striking of said Findings and Conclusions and modifications in others, were made necessary because of the total absence of evidence to support them. Petitioner contended that though a Finding was stricken, respecting GOLDEN BAKE, the Court in some instances did not change certain Conclusions which were based on the said Findings and therefore, *no effect should be given to the striking of said Finding.*

The Circuit Court of Appeals held (p. 9, Printed Decision):

> "We are satisfied that where a Finding is stricken, when the Court's attention is directed specifically to it, the retention of a Conclusion based thereon, was an oversight or an error. The Conclusion must be ignored unless other Findings support it."

For the convenience of this Court, Respondent has included as APPENDIX C of this Brief, the District Court's Findings of Fact and Conclusions of Law, *as amended,* to show the Court's original Findings and Conclusions and to appropriately indicate thereon (by lightly striking out) the stricken Findings or Conclusions or by insertion of amendment in the case of those modified.

The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals in a *unanimous decision,* rendered by its Senior Judge E. A. Evans, reversed the decision of the District Court on all matters set forth in Petitioner's Bill of Complaint, with directions to dismiss the Plaintiff-Petitioner's Complaint, and also, the Defendant-Respondent's Counterclaim. In affirming the District Court on the issues presented by Pillsbury's Counterclaim, the Circuit Court of Appeals stated (Printed Decision, p. 11):

> "A third reason for this conclusion, is the fact that if there *be confusion* in the two carton covers, either in color effect or the use of words or both, said confusion is due to plaintiff's adoption of defendant's trade-mark, with which it was in *alleged confusing competition* as to colors because plaintiff *took defendant's prior use* of blue and yellow background and *built thereon.* We are not prepared to give defendant (Pillsbury) any domination over a competitor through its use of these two colors—or in their position on the carton cover, yet it is clear if we were * * * we would be compelled to give *defendant* the preference *because of its prior use.*" (Emphasis supplied.)

The Circuit Court of Appeals in its decision, made perfectly clear that it gave the District Court's Findings the most careful consideration and that those Findings were controlling wherever the evidence supported them, the C. C. A. stating in its printed decision, page 4, referring to the District Court's Findings:

> "The Court made Findings which it subsequently modified upon defendant's motion. These Findings are controlling with us wherever there is evidence to support them, even though the evidence be strongly disputed."

The C. C. A. further stated (Decision, p. 5):

> "In short, this Court may say and in fact, must decide whether defendant, whose use of 'GOLDEN BAKE' is clear[8] may not add the word 'Mix' even though plaintiff used the words, 'GOLDEN wheat soy MIX' between the date when defendant first used GOLDEN BAKE and the date when its GOLDEN BAKE mix appeared * * *.
>
> We are of the opinion that *not only* is the factual question thus *open* to the Appellate Court, but it is our *unavoidable duty* to *examine the two trade-marks or trade-names or copyrights* and decide the question of fact for ourselves. We must, however, give to the District Court's opinion on such issues, *consideration and weight* because of its source.
>
> In the last analysis, our examination of the cartons and of the names and dates of appearances of said cartons convinces us the *controversy turns largely upon the use of the word Golden.*" (Emphasis supplied.)

It is perfectly clear from the decision of the Circuit Court of Appeals that the controlling and determining factors in its reversal of the District Court and its dismissal of the Bill of Complaint, were as follows:

(1) The matter of dates and prior use of the respective trade-marks and package colors and arrangement thereof, is of major importance. Pillsbury was first in the pancake mix field by fifty years and established its trade-mark GOLDEN BAKE for pancake flour in 1935 and sold the same in blue and yellow paneled packages from the year 1940. Petitioner was the newcomer in the field, introducing its first product, GOLDEN SOY, in November or December, 1942.

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[8]The District Court, itself, decreed Pillsbury's use of the trade-mark GOLDEN BAKE clear, for all pancake mixes (see District Court's Decree, par. 1, Sec. (a) where after granting plaintiff relief, it is provided "except that nothing herein contained, shall prevent defendant from using the trade-mark GOLDEN BAKE (see also District Court's Finding (1)—heading "Counterclaim").

(2) Examination of the actual packages and marks used by the parties shows conclusively that the *controversy turns largely on the priority of use of the word GOLDEN.*

(3) Pillsbury had the right to use its valid trade-mark GOLDEN BAKE and to extend its use with the word "Pillsbury's" at the top of the trade-mark and package and with the addition of the descriptive word "mix" below the trade-mark, as a legitimate extension for its revised soy-containing pancake mix.

(4) No legal distinction can be made between pancake mixes with soy bean additions and those not containing soy.[9]

(5) Petitioner, out of the numberless words it could have chosen (before or *after* receiving written notice of Pillsbury's trade-mark and color panels), selected the word "Golden" and the arrangement of blue and yellow panels on its package, which it found already appropriated in the pancake mix field, by Respondent, Pillsbury.

(6) The overwhelming evidence shows that Respondent, Pillsbury, never abandoned the trade-mark GOLDEN BAKE. The trial Court struck its Finding of Fact (11) under heading "Counterclaim" to the effect that manufacture, offering for sale and sale of GOLDEN BAKE, was discontinued prior to the introduction of Plaintiff-Petitioner's product GOLDEN SOY.

Contrary to Petitioner's (incorrect) references to alleged errors and misstatements in the Decision of the Circuit Court of Appeals (Pet's p. 9 and elsewhere in Brief), the Circuit Court of Appeals made *no mistakes of any consequence.*

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[9]The C. C. A. in its printed decision, p. 6, properly stated: "The litigation is over the use of pancake flour mix packages—it is not over the pancake flour."

Outside of the use of the term "copyright" when "trade-mark" was meant (Printed Decision, p. 10) and the identification of the wrong year in one instance (Decision, p. 12) (immaterial) the Circuit Court of Appeals made only *one* mistake of note which, very apparently, was the work of the Court's copyist. This mistake, on pages 8 and 9 of the C. C. A.'s printed decision consisted in copying into the decision Findings of Fact of the trial Court (15), (18) and (22) under the heading *"Counterclaim"* and Conclusions of Law (4) and (5) under the heading *"Bill of Complaint,"* whereas the same numbered Findings (15), (18) and (22) under the heading *"Bill of Complaint"* were intended and whereas the same numbered Conclusions (4) and (5) under the heading *"Counterclaim"* were intended by the Circuit Court of Appeals. That portion of the decision (p. 9) *immediately following* this mistake, is *only applicable* when the *correct* Findings and Conclusions are applied.

This matter will be fully covered in a subsequent section of this Brief, under ARGUMENT.

(NOTE) In APPENDIX B herein, the entire decision of the C. C. A. (with the exception of the printed replicas of certain of the parties' labels), is reprinted and the portions asserted by Respondent to be controlling or determining, are printed in bold face type. Those portions underlined in red, in Petitioner's APPENDIX B and *alleged* by Petitioner to *constitute mistake*, are similarly underlined in red and after each instance of red underlining, Respondent's counsel, under the heading "Comment," discusses accurately the facts relative thereto and identifies the controlling evidence in the record.

ARGUMENT

Point I. Petitioner's First Reason Relied on Relating to Force and Effect of a So-called Judicial Admission Is Groundless.

A. There Was No "Judicial Admission" or "Stipulation" of Confusion in District Court.

The first time that either of the terms "Judicial Admission" or "Stipulation at the Trial" has *ever* been used *throughout this entire litigation* occurred in the Petition and its accompanying Brief before this Court.

It is true that Petitioner in its Brief before the Circuit Court of Appeals argued an alleged *testimonial* or *quasi-admission* of some kind, relating to confusion on the part of Respondent, but such *was never* claimed to be a judicial admission or stipulation binding on that Court. Nor did Petitioner there specifically identify *any pleading or statements* (Pl's Br. C. C. A. 6, 17-19, 24).

As pointed out by Dean Wigmore in the very section (2588) relied on by Petitioner (Br. 17) *but omitted from the portion quoted,* there is a great distinction between conclusive *judicial admission* and *ordinary* or *testimonial* admissions.

Dean Wigmore stated, after defining a judicial admission or stipulation:

> "This judicial admission is sharply marked off from the ordinary or quasi-admission * * *."

This is further reinforced in Wigmore on Evidence (2nd Ed.), at Section 2594.

The Circuit Court of Appeals *correctly held* against Petitioner's contentions of *testimonial* (not judicial) admissions of confusion on page 11 of the printed decision (R. 960), stating:

> "A third reason for this conclusion, is the fact

> that if there be confusion in the two carton covers, either in color effect or *the use of words* or both, said confusion is due to plaintiff's adoption of defendant's (Pillsbury's) trade-mark, with which it was in *alleged* confusing competition as to the colors, because plaintiff *took defendant's prior use* of blue and yellow background and built thereon * * * if *we were* to give to either party any dominance over the other, *we would be compelled to give defendant the preference because of its prior use.*" (Emphasis supplied.)

Petitioner never attempted to maintain *at the trial* that the *pleadings* or *any statement* of Respondent's counsel or any colloquy between the Trial Judge and Petitioner's counsel established a *judicial admission* or *stipulation*. There is not a scintilla of claim or contention *throughout the entire record,* on the part of Petitioner relative thereto.

Before a judicial admission, made by counsel in the trial of a case, becomes binding upon his client or available to his opponent, it must be reduced to *plain* and *explicit terms* so that its precise extent may be known and it must be *claimed* as *a judicial admission by the opposing party* so that counsel may have the opportunity of qualifying or explaining the admission. This is clearly declared in the case relied on by Petitioner, to-wit: *Oscanyan v. Winchester Repeating Arms Co.,* 103 U. S. 261. The sentence omitted by Petitioner at the end of the first paragraph quoted on Petitioner's Brief, page 17, reads:

> "If a doubt exists as to the statement of counsel, the Court will withhold its direction."

The Court further stated in the same case, page 264:

> "Of course, in all such proceedings, nothing should be taken without full consideration against the party making the statement or admission. He should

be allowed to explain or qualify it as far as the truth will permit."

This Court has repeatedly refused to invoke its discretionary power as to any question which was *not presented and considered before the lower Court.*[10] Certainly, the question presented by Petitioner's first and apparently most important reason relied on for allowance of Certiorari (on the question of the force and effect of a *judicial admission* and * * * scope of Appellate review of Findings of Fact, etc.) *was never before the Circuit Court of Appeals or before the District Court.*

B. The Significance or Interpretation Attempted by Petitioner's Counsel as to Respondent's Pleadings and Statements of Confusion Does Not Constitute Even a Testimonial Admission Prejudicial to Respondent's Case and Is Grossly Inaccurate.

To facilitate this Court's understanding of the following argument, it again is pointed out that Respondent, first in the pancake mix field by some fifty years, established its trade-mark GOLDEN BAKE in 1935 and established the *blue and yellow* package for GOLDEN BAKE in 1940. Petitioner introduced its package, GOLDEN wheat soy MIX, in late July or August, 1943 (R. 168). Respondent, Pillsbury, introduced its later revised package, Pillsbury's GOLDEN BAKE mix, a few weeks thereafter, in late August, 1943.[11] (See Appendix A.)

In its Complaint, Petitioner pleaded confusion *only* between the later packages of the parties, to-wit: GOLDEN wheat soy MIX and Pillsbury's GOLDEN BAKE mix.

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[10]Owens v. Union Pac. R. Co., 319 U. S. 715, 63 S. Ct. 1271; Howitt v. U. S., 328 U. S. 189, 66 S. Ct. 923; Waterloo Distilling Corp. v. U. S., 282 U. S. 577, 51 S. Ct. 282, 284.

[11]Proofs of all said dates fully identified in "Respondent's Statement of Facts" herein.

In its Answer, Pillsbury pleaded confusing similarity between *all* of Petitioner's packages and Respondent's *prior* GOLDEN BAKE package as well as Respondent's later Pillsbury's GOLDEN BAKE mix package. In the same allegation it denied that Petitioner had any rights or goodwill in *any* of *its trade-marks or packages.*

Notwithstanding the specific allegation of Pillsbury in its Answer, as to confusion between Petitioner's package and Respondent's *prior* GOLDEN BAKE package, Petitioner's counsel have the *temerity* to *inaccurately* state (Pet's Br. top par., p. 14):

> "In paragraph 5 of its answer, the Respondent admitted that such 'trade-marks, packages and cartons' (the later products *only* GOLDEN wheat soy MIX and Pillsbury's GOLDEN BAKE mix) are 'confusingly similar.' "

This constitutes distortion. *It is significant* that Petitioner's counsel did *not quote* said paragraph 5 of the Answer.

To show Petitioner's *attempt to misconstrue* the pertinent portion of paragraph 5 (R. 11) of the Answer is here quoted:

> "5. Defendant's answering section 5 of the Bill of Complaint admits plaintiff's GOLDEN SOY packages and plaintiff's GOLDEN wheat soy MIX packages and cartons and plaintiff's alleged trade-marks or names GOLDEN SOY and GOLDEN wheat soy MIX are *confusingly similar to defendant's GOLDEN BAKE* and 'Pillsbury's GOLDEN BAKE mix' packages and trade-marks, *both being in close semblance of defendant's registered trade-mark GOLDEN BAKE and defendant's registered label or carton GOLDEN BAKE for pancake flour;* emphatically denies that plaintiff or its predecessors ever had or now have any ownership in the alleged trademarks or names GOLDEN SOY, GOLDEN wheat soy MIX, or in the carton or label designs used by plaintiff or its predecessors or that plaintiff or its

predecessors is or were owners of any goodwill associated with the business wherein said alleged trade-marks or names GOLDEN SOY and GOLDEN wheat soy MIX have been used * * *." (Emphasis supplied.)

The positive assertions of Respondent contained in the foregoing and *all coupled with Pillsbury's long prior use of its registered trade-mark and label GOLDEN BAKE for pancake flour,* are what Petitioner's counsel inaccurately state constitute a *formal judicial admission,* which they infer should have *compelled* the Circuit Court of Appeals to sustain the District Court's decision against Pillsbury.

In addition to answering the Complaint, Pillsbury asserted a Counterclaim upon the ground that its GOLDEN BAKE packages *antedated* Petitioner's packages and all of them; that the later Pillsbury's GOLDEN BAKE mix label was a legal continuation or extension of its GOLDEN BAKE label and that Petitioner's labels and packages were all confusingly similar to the *prior* GOLDEN BAKE packages and to its later reissue, the Pillsbury's GOLDEN BAKE mix packages (R. 29 to 34). Obviously, the allegations of the Answer quoted above, were intended and understood as a pleading parallel to those of the Counterclaim.

It incontrovertibly follows that *any* "admission" or assertion of confusion on the part of Pillsbury, between Petitioner's packages and the later Pillsbury's GOLDEN BAKE mix packages, *was definitely contingent upon an acceptance or admission by Petitioner,* that: (a) Petitioner's packages were confusingly similar to the prior GOLDEN BAKE package; (b) that Pillsbury's GOLDEN BAKE mix package was a reissue or legal extension of the original GOLDEN BAKE package.

Petitioner *definitely refused* to accept such conditions and denied similarity between its packages and the earlier GOLDEN BAKE packages of Pillsbury (R. 693).

Having failed to accept the conditions upon which the "admission" was offered, Petitioner may not claim any benefit from it. As stated in 31 C. J. S., Evidence, Section 301:

> "One who denies to avail himself of admissions in a pleading, *must accept them as an entirety;* he cannot select such portion as may suit him and reject the remainder, *where it qualifies and explains the admission offered.*" (Emphasis supplied.)

Despite Petitioner's refusal to accept the conditions of Respondent's allegations and despite the fact that Petitioner never claimed a *"judicial admission"* or "stipulation in Court" before, it now asks this Court to consider the subject matter and grant Certiorari thereon.

What has been said of Petitioner's argument respecting the pleadings, applies with equal force to its contentions respecting the statement of Respondent's counsel quoted at page 14, Petitioner's Brief. Respondent's counsel, Mr. Williamson, said, *"We admit that there has been plenty of confusion between these products and we say the plaintiff caused it."* The last portion of this statement, *"and we say the plaintiff caused it,"* constitutes the *same qualifications* or conditions which were present in paragraph 5 of the Answer *and which Petitioner refused.* It is perfectly clear that Petitioner would be the cause of confusion *only if its packages were confusingly similar* to Respondent's *prior* GOLDEN BAKE packages. The statement of Respondent's counsel, therefore, was simply a restatement of the position already taken by Pillsbury in its Answer and Counterclaim. The alleged admission, therefore, included an assertion or admission of unfair competition or label infringement *on the part of Peti-*

tioner against Respondent's *prior* packages, GOLDEN BAKE. Since this was an *assertion* of Respondent's *prior contention* and not a *waiver* of it, it could not constitute a judicial admission. As stated in Wigmore on Evidence (2nd Ed.), Sec. 2588:

> "An *express waiver* made in Court or preparatory to Trial, by the party or his attorney, conceding for the purpose of the Trial, the truth of some alleged fact, has the effect of a confessory pleading * * * so that one party need offer no evidence to prove it and the other is not allowed to disprove it. This is what is commonly termed a solemn—i. e., ceremonial or formal—or *judicial admission or stipulation.*" (Emphasis supplied.)

As just stated, counsel's declaration was *not a waiver* of any of Pillsbury's contentions *nor was it an admission of any fact pleaded by Petitioner.*

The Petitioner pleaded confusion between its GOLDEN wheat soy MIX and Pillsbury's GOLDEN BAKE mix labels. The statement of Respondent's counsel was *directed* towards different facts, to-wit: confusion between Petitioner's GOLDEN wheat soy MIX label and the earlier GOLDEN BAKE label, and also, directed towards the fact that Pillsbury's GOLDEN BAKE mix labels were reissues or extensions of the original GOLDEN BAKE label.

Because Petitioner did not concur in the statement "there has been plenty of confusion * * * and *we say that plaintiff caused it,*" it proceeded (R. 693 and thereafter) to attempt to prove through its witness, J. S. Bond and others, that its labels and the *earlier GOLDEN BAKE labels,* were *not* confusingly similar.

Petitioner seeks also to construe the testimony of *its own witness and president,* R. H. Thomas, Jr., as an admission by Respondent, of confusion only between Peti-

tioner's labels and Pillsbury's later label (Pet's Br. 14). The assertion that one party to a lawsuit can make admissions binding (beyond contradiction) upon his opponent, has only one point of merit, to-wit: *extreme novelty;* but as Dean Wigmore in the excerpt just quoted, sets forth, *"a judicial admission is an 'express waiver' * * * by the party or his attorney."*

Petitioner also points to a single question and answer from the testimony of Pillsbury's witness, Mr. Files (Pet's Br. 15) as corroboration of the claimed judicial admission. Without arguing the question of interpretation of testimony quoted, this part of Petitioner's argument is adequately disposed of by the settled rule that *testimonial admissions are outside the field of judicial admissions and are not binding on the Court, or usually, upon the parties.*

Since confusion was one of the issues tried, Petitioner may not now urge that the pleadings or statements eliminated it as an issue.

Nor may Petitioner point to the statements contained in the pleadings as *evidence* which may be considered in determining the issue of confusion for the plain reason that Petitioner *never put the pleadings in evidence.* This is well brought out in 41 Am. Jur., Pleading, Section 201:

> "For the purpose of availing himself of admissions not responsive to or called for by the specific allegations in the former pleading, but made by way of recital, the parties relying upon them, must put them in evidence, and this for the reason that it is only fair to give the party making such admissions, an opportunity to explain them."

Petitioner contends that a judicial admission (in pleading or at trial) may not be set aside. While this is probably the general rule, it is well established that

where desirable in the interests of justice, such admissions may be set aside by District or Appellate Court.

In the case of *"The Doyle"* (C. C. A. 3rd, 1939), 105 F. (2d) 113, it was held:

> "Such admissions, to be binding, must be unequivocal (22 C. J. 330), and anyway, they may be disregarded in the interest of justice. (Wigmore, Vol. 4, Sec. 2590.)"

In the instant case, the Trial Court never held that there was a "judicial admission."

C. Brief Discussion of Petitioner's Relied Upon Authorities.

Respondent's counsel has previously pointed out how the authorities mentioned in Petitioner's Brief (pp. 16 and 17) (when the portions unquoted by Petitioner are included), are *favorable* to Respondent, in view of the circumstances here.

The case of *Larson Company v. Wrigley* (C. C. A. 7th, 1918), 253 F. 914, clearly differentiates from the circumstances in the instant case but requires some analysis.

In this case, it must be remembered that the principle enunciated as to admission applied to *Larson's Counterclaim* (pp. 916 to 918). Wrigley, the plaintiff in this suit, deliberately attempted to deceive the Court and oppress his opponent. Larson, the defendant, under an injunction, pendente lite, relating to another matter, put upon the market his WINTERMINT package. Wrigley, thereafter, sued Larson on the basis that said WINTERMINT package infringed Wrigley's DOUBLEMINT brand. Wrigley's Bill was dismissed for want of equity. Larson had couuterclaimed (as did Respondent here), seeking to hold Wrigley responsible for unfair competition through the use of the DOUBLEMINT package *after*

Larson's *earlier use* of WINTERMINT. The Court stated (p. 917):

> "The Evidence proved with certainty that WINTERMINT was seven months older than DOUBLEMINT. A reasonably clear Inference was * * * that Wrigley was acquainted with the WINTERMINT package before adopting his DOUBLEMINT package."

Wrigley, throughout his pleadings, had alleged confusion between WINTERMINT and DOUBLEMINT. Naturally, when it was proved that Wrigley was the *latecomer,* he was bound by his *allegations of confusion in litigation which he, himself, started* since the *only* question of confusion before the Court, was between *two* specific packages, WINTERMINT and DOUBLEMINT. The Court, therefore, held Wrigley, the *newcomer,* to his own allegations, despite admitted differences between the packages.

Certainly, there is no analogy between the circumstances of said Larson-Wrigley case and the circumstances here, where the Respondent is the *proven established prior user* of the GOLDEN BAKE package, and the Petitioner, Soy Food Mills, Inc., is the newcomer.

Petitioner, in its Brief (p. 9), before the Circuit Court of Appeals, at one point correctly summarized the law of this case, setting forth as a *"Proposition of Law Relied Upon":*

> "1. In an unfair competition case, where the *latecomer* in the field in its pleadings and otherwise, admits confusion, between his goods and those of plaintiff, affirmative proof of 'passing off' is unnecessary to the establishment of a cause of action."
>
> *L. P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co.,* 253 F. 914.

In the other cases cited by Petitioner (Br. 19, 20), the admission or statement made by one of the parties was submitted to the Trial Court *during the trial,* as a judicial admission. The Trial Court considered it and gave the party making it his opportunity to qualify it and when qualified, the *entirety* (not a fragment thereof) constituted a judicial admission.

D. If we Assume an Unqualified Admission on the Part of Respondent, That Confusion Between Petitioner's Later Package GOLDEN Wheat Soy MIX and Respondent's Later Package GOLDEN BAKE Mix Alone Existed, Petitioner's First Reason for Allowance of a Writ Still Fails.

Even on such totally erroneous assumption, Petitioner's first point fails because there is no claim in the Petition or accompanying Brief (much less any proof identified thereon), that such confusion was caused by Respondent or that such confusion was *not* the result of Petitioner's appropriation of Pillsbury's *prior* established rights for GOLDEN BAKE. There were no District Court Findings to such effect.

In the Petition and accompanying Brief, there is no attempt to show how the so-called "judicial admission" required the Circuit Court of Appeals to hold for Petitioner on its Bill of Complaint. Petitioner's argument on this subject is restricted, *first* (Br. pp. 13 to 16), to explanation of what Petitioner contends (erroneously) constituted a judicial admission of confusion by Respondent, and, *secondly* (Br. pp. 16 to 20), to discussion of cases which are alleged to show, "That it is a rule of this Court, that a party will not be heard to question on review, a stipulation or admission freely entered into in the Trial Court."

Petitioner's First "Reason Relied On" reads as follows:

> "(1) On the question of the force and effect of a judicial admission and on the question of the scope of Appellate review of Findings of Fact, the Circuit Court of Appeals in this case, rendered a decision which is in conflict with the decisions of this Court and of other Circuit Courts of Appeals."

Certainly Petitioner's Brief shows no conflict between the decision of the Circuit Court of Appeals here and the decisions of this Court and of other Circuit Courts. The circumstances and facts *only* are very different in the instant case from those in any of the authorities relied upon by Petitioner.

Point II. Petitioner's Point II Is a Misstatement of the Applicable Law Relating to Rule 52 (a), Rules of Civil Procedure, and Is Not Even Supported by Petitioner's Cases Relied Upon.

Point II of Petitioner's Brief, page 21, reads as follows:

> "Where a Finding of Fact of a District Court is based on conflicting oral testimony and there is no indication that the testimony supporting the Finding is *dishonest or unmistakably incredible,* the Finding is conclusive under Rule 52 (a), Rules of Civil Procedure." (Emphasis supplied.)

Rule 52 (a), provides:

> "Findings of Fact shall not be set aside unless *clearly erroneous* and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses."

Certainly, the rule, on its face, leaves no inference that only *"dishonest or unmistably incredible testimony"* is meant by the terms "clearly erroneous," nor do any authorities known to Respondent's counsel or cited by Petitioner, support Petitioner's mistaken contention.

The general interpretation of Rule 52 (a) is that the Appellate Court has the right to review the evidence and reverse the Lower Court's Finding, if (a) it is unsupported by substantial evidence; (b) contrary to the clear weight of the evidence; (c) or is induced by an erroneous view of the law.

Chatz v. Armour Plant Employees' Cred. Union (C. C. A. 7), 154 F. (2d) 236, Cert. Den. 67 S. Ct. 83.

Sears Roebuck & Co. v. Talge (C. C. A. 8), 140 F. (2d) 395 (Revers. Low. Ct.).

Fleming v. Palmer (C. C. A. 1), 123 F. (2d) 749, Cert. Den. 62 S. Ct. 940.

Further, the leading authorities construing Rule 52 (a) make clear that there is a material distinction in the powers of the Appellate Court, between *evidentiary findings* and *findings of ultimate facts* and holdings which constitute *mixed findings and conclusions of law,* regardless of how such holdings are classified by the Trial Court. Such authorities point out that it is the duty of the Appellate Court to reverse findings of ultimate fact or holdings constituting mixed findings and conclusions of law when the same are inconsistent with the preponderance of the evidence or weight of authority.

The authorities further make a clear distinction where the Trial Court's findings are predicated to a considerable extent upon exhibits and documentary evidence as contrasted with merely testimonial evidence.

The principles enunciated in the following cases and the discussion thereof are truly exemplary of the application and construction of Rule 52 (a) as to the distinctions stated.

In the case of *Bendix Home Appliances v. Radio Accessory Co.* (C. C. A.), 129 F. (2d) 177, one of the important findings proved to be an ultimate finding or a

conclusion of law, which was erroneous. The Court held that its inclusion within the Court's Finding of Fact is not determinative of its real nature nor is it binding upon this Court (C. C. A. 8). The Trial Court was reversed.

In the case of *J. S. Tyree, Chemist, Inc., v. Thymo Borine Lab.* (C. C. A. 7th, 1945), 151 F. (2d) 621, the Court held that

> "the rule that the C. C. A. is bound by the findings of the Trial Court, if they are supported by the evidence, does not operate to entrench with like finality, *the ultimate fact conclusions drawn therefrom.* The case was a suit for unfair competition and trademark infringement wherein the Lower Court had dismissed the complaint. The Trial Judge made special findings upon which he stated his conclusions. In this case, the findings distinguished the plaintiff's and defendant's packages and the conclusions were that the defendant had not colorably imitated any of the trade-marks of plaintiff or affixed them to goods of the same descriptive properties. The C. C. A. reviewed the evidence, including exhibits and documentary evidence and found that the evidence clearly showed there was confusion, warranting a decree of infringement. The Lower Court was reversed."

Becker v. Loew's, Inc. (C. C. A. 7), 133 F. (2d) 889.

This was a suit for copyright infringement and unfair competition. The District Court adopted the report of the Master who tried the case and held for plaintiff finding both copyright infringement and unfair competition. The Circuit Court of Appeals reversed the decision, stating:

> "Although we agree that the findings and conclusions of the Master adopted by the District Court should not be disturbed unless there is most cogent evidence of mistake * * * yet where the ultimate finding is a conclusion of law or *at least, a determination of a mixed question of law and fact,* as it is

in this case, it is subject to judicial review and our duty is *not* to place a perfunctory stamp of approval upon the work of the District Court. * * * This we have done and have concluded that there has been no infringement and no unfair competition." (Emphasis supplied.)

Cert. Denied 63 S. Ct. 1438, 319 U. S. 772.

Harris Stanley Coal & Land Co. v. Chesapeake & O. Ry. (C. C. A. 6), 154 F. (2d) 450, 452, 453.

The Court here, in reversing the Trial Court as to plaintiff's Complaint, stated:

"We are not here confronted, however, with any conflict of evidence as to evidentiary facts nor * * * credibility of witnesses. The issue is whether in the light of all the circumstances, there is threat of injury in the proposed operations of the coal company. * * * The conclusion that there is or is not such danger and if there is, whether it is imminent or remote, is one that a reviewing Court is itself, competent to draw. It remains free to draw the ultimate inferences and conclusions which evidentiary findings reasonably induce."

Kuhn v. Princess Lida, etc. (C. C. A. 3), 119 F. (2d) 704.

Globe Union, Inc., v. Chgo. Tel. Supply Co. (C. C. A. 7), 103 F. (2d) 722, and other authorities.

In re Chicago N. W. Ry. Co., etc. (C. C. A. 7), 110 F. (2d) 425, 427, quoting from the Court's decision:

"In the instant case, the bulk of the record stands on documentary evidence although some oral evidence was adduced. * * * The facts are not in dispute and in such situation, the legal deductions and conclusions of law drawn by the District Court, while worthy of great consideration, are not binding on this Court nor are the findings conclusive on this Court unless supported by substantial evidence."

In *Fleming v. Palmer* (C. C. A. 1), 123 F. (2d) 749, the Circuit Court of Appeals held that it was as competent to consider exhibits and documentary evidence as was the District Court.

Point III. In the Few Instances Where the Holdings of the Circuit Court of Appeals Contradicted "Findings of Fact" of the District Court, They Were Due to a Finding Induced by an Erroneous View of the Law or Contrary to the Overwhelming Evidence or Constituting a Holding on a Mixed Question of Fact and Law.

From brief consideration of the eight Conclusions of Law relating to Petitioner's case (R. 892, see APPENDIX C herein) it will be seen that only one thereof, to-wit: Conclusion (4)—"Bill of Complaint" determined Petitioner's case against Respondent in the Trial Court. This Conclusion read:

> "Defendant, Pillsbury, * * * has been guilty of unfair competition in *creating a state* of public confusion and deception between its product GOLDEN BAKE mix and plaintiff's products GOLDEN SOY and GOLDEN wheat soy MIX and in *'passing off' its product* as that of plaintiff's." (Emphasis supplied.)

This Conclusion was most erroneously left by the Trial Court after it had properly stricken its Finding (18)—"Bill of Complaint" of "passing off" and its Finding (22)—"Complaint" infringement of Petitioner's copyright 21,789. It should also be remembered that the Trial Court held against Petitioner on its case for trade-mark infringement, dismissing the bill relative thereto at Petitioner's cost (Decree, Par 7, R. 907, Vol. 2) and substantially held that Respondent's trade-mark GOLDEN BAKE was clear (Decree, Par. 1, end of Section (a), stated: "except that nothing herein contained shall pre-

vent defendant from using the trade-mark GOLDEN BAKE").

What Findings of Fact did the Trial Court have to justify adherence to his said Conclusion (4)? The answer is NONE. Certainly Findings (under "Complaint") (5), (12), (13) and (17) to the effects—no confusion until Pillsbury's GOLDEN BAKE mix was introduced; Pillsbury not justified through past use of GOLDEN BAKE package, to use "Pillsbury's GOLDEN BAKE mix" package; resemblance between the illustrations of food dishes on back sides of the parties' later packages; and confusion admitted between the specific later packages of the parties only, *did not justify said Conclusion (4) under "Complaint."*

The Circuit Court of Appeals held that Respondent's use of its GOLDEN BAKE label and trade-mark is "clear" (R. 954, 959, 960 and elsewhere in decision). The District Court substantially held that GOLDEN BAKE (trade-mark and label) was "clear" as previously pointed out and in striking its Finding 11 ("Counterclaim") and Conclusion 4 ("Counterclaim") which related to abandonment of GOLDEN BAKE.

Petitioner's inaccurate comment (Br. 22, 23) requires clarification. There is no evidence of any substance that GOLDEN BAKE was not recognized by the public as Respondent's product; that it enjoyed no goodwill or that it was not a product competitive to Petitioner's. Nor did Respondent ever concede such *distorted* contentions or erroneous Findings 9 to 14 relative thereto. The overwhelming testimony, including actual sales and shipper's orders from 1941 to 1944; testimony of four Pillsbury executives; and compilation of records on sales was never disputed unless the self-serving statement of Petitioner's president, Mr. Thomas, that

he hadn't been able to find GOLDEN BAKE packages, could be considered controlling.

Petitioner's statement (Br. 23)—"that its (GOLDEN BAKE) manufacture and sale were virtually discontinued *prior* to the introduction of GOLDEN BAKE mix," is not true. The Finding referred to, No. 12 ("Counterclaim"), states: "Discontinued * * * *at the time* it (Pillsbury) introduced the competitive product GOLDEN BAKE mix." (Emphasis supplied.) This has a *very different significance* than that attempted by Petitioner and *is consistent* with the District Court's striking its Finding and Conclusion relating to abandonment.

The said Finding 12, Respondent contended, was *glaring error* in view of the overwhelming evidence against it, but even if undisturbed, it does not mitigate in any way, against the *holding of the Circuit Court of Appeals that Pillsbury's GOLDEN BAKE mix was a legitimate extension of its GOLDEN BAKE trade-mark and label.*

Said last mentioned holding by the Circuit Court of Appeals (R. 960 and elsewhere) was based on ultimate fact conclusions and required the reversal of only one Finding of Fact of the District Court, to-wit: Finding 12 ("Complaint"), which read:

> "The dress and style of defendant's GOLDEN BAKE mix carton and label, more closely approximates plaintiff's GOLDEN SOY and GOLDEN wheat soy MIX cartons * * * than is in any way justified by defendant's past use of the trade-mark GOLDEN BAKE and blue and yellow color combinations for GOLDEN BAKE and other products."

Actually, the reversal of this one Finding 12 and the holding that the Pillsbury's GOLDEN BAKE mix package was a *lawful extension* of Respondent's prior GOLDEN BAKE trade-mark and label of itself, *completely de-*

stroyed Petitioner's cause of action against Respondent for unfair competition.

Certainly, the said "Finding" 12 ("Complaint") involved an ultimate fact conclusion or a mixed question of fact and law. Certainly, it was not an evidentiary Finding alone. In other words, the District Court to determine "justification" by Pillsbury's past use (prior to Petitioner's) of GOLDEN BAKE and its colors, required consideration of the law applicable to the circumstances. Therefore, the strictness usually required under Rule 52 (a) as shown by the cases previously cited, did *not apply* because said "Finding" 12 ("Complaint") expressed an ultimate fact conclusion; involved a question of mixed law and fact and was arrived at by error in law, on the part of the District Court.

Furthermore, the said "Finding" 12 ("Complaint") required primarily a consideration of documentary or physical evidence, to-wit: the packages, labels and trade-marks and undisputed introduction dates of the respective parties. The Circuit Court of Appeals properly stated that it had as much right to draw such ultimate fact conclusions and legal conclusions as did the Trial Court and that it had before it, the identical evidence, the packages and trade-marks.

The decision of the Circuit Court of Appeals, relative to dismissal of Petitioner's Complaint was predicated, little *if to any extent* upon "no confusion" between the parties' later labels. It was predicated, as has been pointed out earlier herein, upon Pillsbury's long established and prior rights to the predominating feature "GOLDEN" and the use of blue and yellow panels and the fact that Pillsbury's same trade-mark GOLDEN BAKE and general color scheme were used upon the reissue package, Pillsbury's GOLDEN BAKE mix.

Petitioner's remarks (under Section 4, p. 25 of its Brief) to the effect that Pillsbury's later package was designed *after* prior knowledge of GOLDEN wheat soy MIX, is incorrect, as Petitioner well knows.

Petitioner's president, R. H. Thomas, was asked:

"Q. Now, when was GOLDEN wheat soy MIX first sold on the market as exemplified by Exhibit 11?

A. Do you mean by that question when was it first shipped to purchasers?

Q. What do you mean by 'selling'?

A. Well, it is very possible to take orders for a product before you make shipment.

Q. When was it first applied to your goods, namely, that package?

A. The first shipments of this package, as I recall, were in the latter part of July or August of 1943.

Q. That was probably your first use of this label, is that right?

A. I believe so."

In spite of this indisputable evidence and the fact that Pillsbury's GOLDEN BAKE mix labels were designed, ordered and printed *before such date,* Petitioner has the temerity to now contend otherwise.

The Trial Court's Finding 6 ("Complaint") taken from Petitioner's proposed Findings, is somewhat deceptive. It relates only to *redesigning* and *adoption* of the redesigned GOLDEN wheat soy MIX label. When, Petitioner redesigned the condemned label (GOLDEN SOY), is immaterial. The material point is: *When did Petitioner use it?* This was in August, 1943, by Petitioner's own statement.

A recent case directly in point as to types of findings reversed by the Appellate Court and incidentally also dealing with extension and change of a package label, is Magazine Pub. Assn. v. Davis (CCA 2) 147 F2d 182.

The case went far beyond the CCA 7th here.

Point IV. The Third Question Raised by the Petition and Point III of Petitioner's Brief, Are Wholly Without Merit.

Petitioner's many references to alleged errors, misstatements, inaccuracies, "indirections," "abusive power of review," "influenced by factors outside the record" and "certain other factors" appearing in the Petition and accompanying Brief, constitute misstatement and exaggeration on the part of Petitioner's counsel. Outside of the Court of Appeals' use of the term "copyright" when "trade-mark" was meant (printed Decis. p. 10, R. 959, third par.) and the identification of the wrong year in one instance (Decis. p. 12, R. 959, fourth par.) (when the correct year was 1940, still was long before Petitioner's use), the decision of Judge Evans made only *one mistake of note* which very apparently, was the work of the Court's copyist. This mistake (pp. 8 and 9 of the printed Decis., R. 957, 958) consisted in inadvertently copying into the decision, Findings of Fact of the Trial Court, (15), (18) and (22) under the heading "Counterclaim" and Conclusions of Law (4) and (5) under the heading "Bill of Complaint." The same numbered Findings (15), (18) and (22) under the heading "Bill of Complaint" were obviously intended by the Court and *were the ones stricken* by the Trial Court and read as follows:

> "15. Prior to its introduction of GOLDEN BAKE mix in September, 1943, defendant had never previously used a label color scheme comprising the colors blue, yellow, red and white.
>
> 18. Plaintiff has proved that GOLDEN BAKE mix has been and is being passed off as plaintiff's product.

22. Plaintiff is the owner of label copyright registration No. 21,789 for its GOLDEN wheat soy MIX label. This copyright registration has been and is being infringed by defendant's GOLDEN BAKE mix."
(ALL STRICKEN.)

The comment and holding of the Circuit Court of Appeals following the mistaken copying of said Findings (last two pars., R. 958) is applicable and properly so only when the correct Findings (herein quoted) are substituted.

The same reasoning applies to the copyist's inadvertent inclusion of the wrong Conclusions (4) and (5) under "Bill of Complaint" whereas the same numbered Conclusions under "Counterclaim" were intended. In fact, the Court immediately after the inadvertent quoting of the wrong Conclusions (4) and (5) (R. 958) stated:

> "It did not, however, strike either Conclusions of Law No. 1 or No. 3 which it entered on Defendant's *Counterclaim.*" (Emphasis supplied.)

Reading of the Decision of the Circuit Court of Appeals shows that all controlling and determining portions, including the Court's analysis of the questions raised; its reasons for its conclusions; and its final conclusions, are all free from mistake or error other than the mere inadvertencies mentioned.

In Respondent's APPENDIX B herein, the portions of the Decision of the Circuit Court of Appeals which are *apparently determining,* are printed in *bold face type.* The red underlining used by Petitioner in its Appendix B is reproduced and immediately after each instance of red underlining (which Petitioner alleges was mistaken by the C. C. A.), Respondent's counsel *correctly*

comment on the circumstances and fact and correctly *identify the proofs thereof.*

Stripped of rhetoric and embellishment, Points II and III of Petitioner's Argument and the actual questions raised thereby, constitute nothing other than a desire and request on the part of Petitioner, to have this Court *for the third time,* review all the evidentiary facts in this entire litigation and make new holdings relative thereto. It is not believed this Court will exercise its discretionary power to do such.

A mere recital of the following excerpts from Petitioner's Brief shows the length to which this disappointed litigant has gone in attempting to discredit the unanimous decision rendered by the Senior Judge of the Seventh Circuit Court of Appeals (references to Petitioner's Brief):

> "It is apparent that the Court missed the entire point of the case. Further, it is not an exaggeration to say that the decision and opinion represent a shocking deviation from established judicial procedure" (p. 9).
>
> "Intertwined with the Circuit Court of Appeals' holding in this case, is a glaring refusal to observe certain fundamental principles of judicial review which, it is submitted, must be observed" (p. 21).
>
> "In most instances, the reversal of the Findings of Fact of the District Court is accomplished by indirection" (p. 22).
>
> "Its Opinion merely *assumes* in passing that Respondent's use of GOLDEN BAKE 'is clear' and has continued since 1935" (p. 23).
>
> "To state the Finding as the Circuit Court of Appeals did is to beg the question at issue" (p. 23).
>
> "Unhesitatingly, we assert that the Circuit Court of Appeals in this case abused its powers of review. It is impossible to believe that it seriously considered the record of oral testimony" (p. 27).

"That the Court was influenced by *certain factors which were completely outside of the record* and by certain *other factors* which although in the record, had no bearing on the controlling issues" (p. 33). (Emphasis supplied.)

"We seriously question whether there has ever been a reported decision from a Circuit Court of Appeals in which the Opinion contained so many outright misstatements of fact. Judge Evans' Opinion is predicated from an almost complete misconception of the controlling facts of the case" (p. 64).

CONCLUSIONS

(a) The decision and judgment of the Circuit Court of Appeals reversed *only* those Findings of Fact of the Trial Court which were *"clearly erroneous"* within the meaning of Rule 52(a) of the Civil Rules of Procedure. The only Findings reversed either constituted glaring error or were ultimate fact conclusions or even though designated as Findings of Fact, were in reality mixed Findings of Fact and Conclusions of Law. The reversed Findings were clearly contrary to the overwhelming evidence and contrary to logical deductions obtained by an inspection of the physical packages and labels which the Appellate Court had before it and which the Appellate Court could consider as aptly as the District Court.

(b) There is nothing shown in the Petition or its accompanying Brief which proves that the actual facts or circumstances of the questions submitted by the Petition, come within the scope of the subject matter specified in Rule 38, Par. 5, Section (b) (Rules of the Supreme Court) or Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

(c) The erroneous Findings overruled by the Circuit Court of Appeals, consisted for the most part, of

Findings induced by the Trial Court from *erroneous application of the law.*

It is submitted, therefore, that nothing whatsoever, ~~therefore~~, is presented by Petitioner which even approximated an adequate warrant for the Grant of Certiorari in accordance with procedure which this Court has developed in its rules and its decisions. Refusal and denial of the Petition is respectfully solicited.

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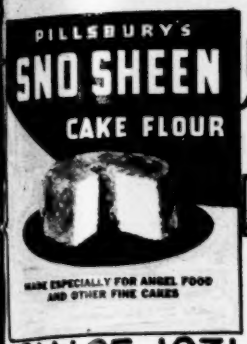
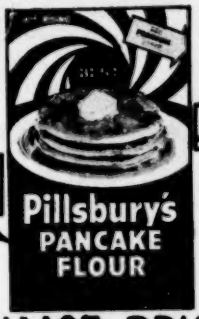
RESPONDENT'S PACKAGES



EX-C

EX ZZZ-3



EX-D

SINCE 1931

SINCE PRIOR TO 1929

SINCE 1935

EX-22

SINCE 1933

EX-G

SINCE 1940 IN BLUE AND YELLOW PACKAGES

1936 TO 1940 IN BROWN AND YELLOW PACKAGES

EX-Q

SINCE LATE AUG. 1943

PETITIONER'S PACKAGES

EX-7

EX-11

OM DEC. 1942 UNTIL ADJUDGED
ANDED AND PACKAGES CONDEMNED

SINCE AUG. 1943

APPENDIX "B"

DECISION OF THE CIRCUIT COURT OF APPEALS

NOTE: The portions of the following decision contended by Respondent to be **determining and controlling,** are herein printed in "bold face" type.

Petitioner, in its brief, Appendix B, underlined in red, certain portions of the decision which Petitioner contended constituted mistake on the part of the C. C. A. Those portions are indicated herein, in similar manner by red underlining and immediately thereafter, under the heading "Comment" in each instance, Respondent correctly comments upon the subject matter of the red underlining and identifies the controlling proofs relative thereto.

In the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

No. 8996. October Term, 1946, April Session, 1947.

SOY FOOD MILLS, INC.,
Plaintiff-Appellee,

vs.

PILLSBURY MILLS, INC. (Formerly by Name Pillsbury Flour Mills Company),
Defendant-Counterclaimant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

April 10, 1947.

Before Evans, Sparks, and Minton, Circuit Judges.

Evans, Circuit Judge. This appeal is from a decree rendered in an unfair competition and infringement of trademark and copyright suit wherein each party sought relief from the other.

The plaintiff charged defendant with unfair competition and with the infringement of its copyright, "Golden wheat-soy Mix" and also with infringement of its copyright, "Golden Soy Griddle Cake Mix."

Defendant filed an answer and also a counterclaim. It denied the facts upon which plaintiff based its prayer for relief, and also sought affirmative relief, consisting of an injunction against plaintiff's use of its trade-mark, "Golden Bake" and from other unfair methods of competition and from advertising or attempting to sell its products as defendant's made product. It also sought an injuction to stop plaintiff's alleged infringement of defendant's registered labels and its trade-marks.

Both sides also sought damages and an accounting.

After an extended trial, the court found in plaintiff's favor on some of its unfair competition charges and against it on certain of its other charges. It found against the defendant on all of the material and controverted charges set forth in its counterclaim.

The importance of accuracy justifies our setting forth in **haec verba,** the terms of the decree. We quote therefrom.*

---

* "* * it is
"Ordered, adjudged and decreed as follows:

"(1) That a writ of perpetual injunction issue herein strictly enjoining and restraining * defendant, Pillsbury Mills, Inc., * * and all in privity with it from (a) offering for sale and/or selling to the public a pancake, waffle and/or muffin flour blend containing a Soybean ingredient under the trade-mark Golden Bake Mix or any other trade-mark which is a colorable imitation or close simulation of plaintiff's trade-marks, Golden wheat-soy Mix and Golden Mix, except that nothing herein contained shall prevent defendant from using the trade-mark Golden Bake;

"(b) offering for sale and/or selling to the public a pancake, waffle and/or muffin flour blend containing a Soy bean ingredient packaged in a carton or other container, the exterior of which has a yellow, blue, white and red dress and style and/or one in which the respective colors and/or design elements are so arranged and disposed as to closely resemble the dress and style and arrangement and disposition of colors and/or design elements on plaintiff's Golden wheat-soy Mix package and from otherwise unfairly competing with the plaintiff in the dress and style of its package;

"(c) reproducing and publishing labels for a pancake, waffle and/or muffin flour blend in infringement of plaintiff's label copyright No. KK 21789 entitled 'Golden wheat-soy Mix';

"(d) utilizing in the sale of a pancake, waffle and/or muffin flour blend containing a Soy bean ingredient the slogan 'The New Soy Taste Sensation,' or any other slogan which is a colorable imitation or close simulation of plaintiff's trade-mark slogan, 'The Soy Bean Taste Sensation.'

"(2) That plaintiff * * recover from defendant * * the profits and damages accruing by reason of the unfair competition of the de-

Both parties are engaged in selling a flour mix. The label copyrights and trade-marks involved, and the alleged unfair competition turn on the cover designs and words appearing on the cartons that carry flour.

Reproduced herewith, is the trade-mark, Golden Soy, and trade-mark, Golden Mix [and the label copyright, Golden wheat-soy Mix, all plaintiff's.] (1)

Comment (1) The slight mistake here, is inconsequential. The term "copyrighted label" should have been substituted for "label copyright."

(Cuts of Petitioner's GOLDEN SOY and GOLDEN MIX trade-marks and Petitioner's GOLDEN SOY, GOLDEN MIX and GOLDEN wheat soy MIX labels, appeared here in Decision. For colored representations of packages, see APPENDIX A herein.)

Defendant's 1935 trade-mark is herewith reproduced and the label which it used after August, 1943, is also reproduced. The colors are of necessity eliminated.

(Cuts of Respondent's original trade-mark GOLDEN BAKE (1935) and Respondent's later Pillsbury's GOLDEN BAKE mix label (Aug., 1943), appeared here in the Decision. For colored representations of packages, see APPENDIX A herein.)

---

fendant * * and the profits, damages accruing by reason of the unfair competition of the defendant * * and the profits, damages and reasonable attorneys' fees for the infringement by defendant of plaintiff's aforesaid identified label copyright. * *

"(3) That * defendant * * deliver up for computation and destruction all labels, cartons, packages, cases, signs, and other advertising matter which in whole or in part infringe plaintiff's aforesaid label copyright.

"(4) That plaintiff recover from defendant its taxable costs herein.

"(5) Plaintiff has not sustained its charge of infringement of its label copyright No. KK 18584 entitled 'Golden Soy Griddle Cake Mix' and plaintiff's complaint as to infringement of said copyright should be and the same is hereby dismissed at the plaintiff's costs.

"(6) That the defendant, Pillsbury Mills, Inc., has failed to sustain any of the charges of trade-mark infringement, unfair competition and infringement of label copyrights set up in the counterclaim and supplemental counterclaim and said counterclaim and supplemental counterclaim should be and the same hereby are dismissed at the defendant's costs.

"(7) That the plaintiff has failed to sustain its charges of trade-mark infringement as distinguished from its charges of unfair competition against defendant and plaintiff's complaint as to trade-mark infringement should be and the same is hereby dismissed at the plaintiff's costs.

WALTER J. LaBUY,
United States District Judge."

The Court made findings which it subsequently modified upon defendant's motion. These findings are controlling with us wherever there is evidence to support them, even though the evidence be strongly disputed.

Defendant argues that certain findings are wholly unsupported by evidence and must be rejected by us. It is this contention which makes this appeal so involved factually and so difficult of satisfactory statement and determination. For example, **we are asked by plaintiff to accept the Court's appraisal of the defendant's trade-mark, Golden Bake, and its denial of defendant's right to add to the words, "GOLDEN BAKE," the word, "MIX."**

It also asks us to accept the Court's finding that defendant adopted Golden Bake Mix deliberately and with knowledge of plaintiff's product and its name, Golden wheat-soy Mix. It bases its case largely on this adoption of names, which, together with the carton and label so similar to plaintiff's cartons that defendant was able to, and did, pass off its product as plaintiff's product. Its charge of unfair competition is thus established, so plaintiff argues.

Defendant, on the other hand, argues that there is no evidence, other than the labels themselves which are before the Court and which we can evaluate as well as the District Court, which supports the finding of unfair competition by defendant. The same is true of its asserted claim of protection under its trade-mark, "GOLDEN BAKE." It contends that there is nothing sacrosanct about a district court finding when that finding deals with a trade-mark and a trade-name. In short, this court may say, and in fact must decide, whether defendant, whose use of "Golden Bake" is clear, may not add the word, Mix, even though plaintiff used the words, "Golden wheat-soy Mix" between the date when defendant first used Golden Bake and the date when its Golden Bake Mix appeared. The evidence, so it is argued, is of equal persuasiveness in both courts. Just as a finding in the District Court is not conclusive where the evidence is by deposition—equally open to both courts—so is the question presented by the use of trade-names open to both lower and appellate courts for their separate determination as to confusing similarity.

We are of the opinion that not only is the factual question thus open to the appellate court, but it is our unavoidable duty to examine the two trade-marks or trade-names or copyrights and decide the question of fact for ourselves. We must, how-

ever, give to the District Court's opinion on such issues, consideration and weight because of its source.

In the last analysis, our examination of the carton and of the names and the date of appearances of said cartons convinces us the controversy turns largely upon the use of the word, Golden. It is clear that the defendant's objectionable cartons and words selected by it to describe its product do not constitute a Chinese copy of plaintiff's carton or trade-mark or trade-name or advertisement. Likewise, plaintiff did not use defendant's prior chosen trade-mark, Golden Bake. On the question of unfair competition we find the colorings of cartons used by the plaintiff are not exactly similar to those used by the defendant nor were defendant's exactly similar to those used by plaintiff.

Rather important is the matter of dates. Defendant was an old manufacturer in the field. It was one of the largest pancake flour manufacturers in this country. It had been a leader in the flour business, including pancake flour, for many years —over half a century. Plaintiff appeared in the commercial field in 1942 and enlarged its business in 1943. It did not manufacture its flour but caused a flour mill to prepare its product in accordance with a formula which it submitted.

Such competition as existed between the parties arose in 1943. At this time the country was at war and conservation of flour was a government objective. This was accomplished in part by the introduction of soy bean flour into the pancake flour mixes.

Plaintiff insists, that its formula has great merit. The Court's finding in respect thereto is conclusive. We accept it.

Soy bean, as an addition to the wheat or other flour used in pancake or muffin flour, while not new in 1942, became a more important factor during these war years. Whether the public was moved by patriotic sentiment or a fondness for soy flour in pancake mixes is immaterial. It was an ingredient which both companies could use and in the proportion which each chose. The more used, the better the Government liked it. [Plaintiff's percentage of soy flour was relatively small.] (2) Defendant used as much as twenty percent in its pancake flour mix.

Plaintiff was not the first to use soy bean flour in pancake flour [nor did it precede the defendant in its use in this field]. (3) There were also other pancake flour manufacturers

who made a pancake mix with soy bean additions, prior to 1942.

Comment (2 and 3). While the statements underlined are not in any way controlling in the decision of the C. C. A., they are literally correct and certainly do not constitute error as contended in Petitioner's Brief (pp. 68, 69). Petitioner's own witness and expert, Dr. Fearn testified (R. 103), that the percentage of soy in Petitioner's products was approximately 12%.

As to (2), there was no dispute that Pillsbury's Research Department, prior to January 1, 1942, had perfected, tested and actually used its revised pancake mix formula with soy-making products therefrom in feeding the same to consumer panels and district managers of Pillsbury (R. 622, 623, 646, 649, 582, 583; Exhs. MM and MM-1, R. 823 and 825).

Petitioner's contention that GOLDEN SOY was the first pancake flour advertised and sold on the basis of soy content, was completely overcome by the testimony of the executives representing four competitive food mix companies who stated that said four companies had all manufactured and sold pancake flour containing substantial soy ingredient, long prior to Petitioner's advent in business; that their trade area was larger than Petitioner's and that sale had been stimulated through advertising of soy taste and "tang." Their labels and specimens of advertising were introduced in evidence. (R. 410-429; 436-444; 448-459; Exhs. X, AA; DDD-1 to DDD-8, R. 834; EEE and FFF, R. 835.)

Over-emphasis has been given to the contents of the mix, so we think. The controversy is over the words of the trademarks, together with the colors which appear on the cartons in which the mix was sold. The litigation is over the use of pancake flour mix PACKAGES. IT IS NOT OVER THE PANCAKE FLOUR.

It is important to bear in mind that pancake flour MIX may have ingredients other than soy bean flour. The word, Mix, indicates merely that it is not a straight wheat flour, or buckwheat flour, or rice flour, but has an additional ingredient.

Defendant contends that plaintiff has been guilty of unethical conduct aside from its unfair competition which must preclude it from obtaining any affirmative relief in a court of equity. In other words, plaintiff's hands are not clean.

It asserts first, that plaintiff used the word, Mills, in its name (Soy Food Mills, Inc.) to inform the public falsely that it made its own product whereas it never made any of its

product but purchased its mix from a flour mill which made the product for it.

Second, defendant argues that the United States Government instituted a libel against the plaintiff's pancake flour, charging the use of false and deceiving advertising matter on the cartons containing its pancake flour mix, and obtained a decree enjoining plaintiff from selling its product in such cartons because said cartons carried false and deceptive advertisements and [because plaintiff falsely asserted the existence of ingredients not in its mix] and attributed to its product virtues which were untrue. The court, later, permitted plaintiff to sell its products in cartons with the objectionable advertisements eliminated [but only under the supervision of the "Food and Drug Administration, Federal Security Agency"] and upon plaintiff's paying the "transportation, salary and such other necessary expenses" "incurred by the Administration in connection with said supervision." [This concession by the government to the plaintiff was due to the government's desire to avoid the loss of any wheat flour.] (4)

Comment (4). The substance of the C. C. A.'s red underlined statements is correct as far as effect of the libel proceedings were concerned. (See Libel Complaint and certified copy Decree, Exhs. JJ and KK (R. 803 and 807).) As to the last statement, it is quite probable that the C. C. A. took judicial notice of the **war situation** of the U. S. Government.

The foregoing statements were only claimed by Petitioner as **minor error** and its claim as above shown, is groundless. If true, it certainly had no effect in determining the C. C. A. decision.

In the development of its trade-mark and trade-name, plaintiff first used Golden Soy. It used this label on its cartons. It neglected to publish notice of such copyright on 1,000,000 of its cartons. Defendant argues that plaintiff lost its copyright thereby and in legal effect dedicated it to the public. Thompson v. Hubbard, 131 U. S. 150, 151. Defendant, however, goes further and contends that plaintiff could not regain its rights thus lost by failure to give notice to the public, by securing another trade-mark covering the same subject. It relies on **Universal Film v. Copperman,** 218 F. 577 and **Sieff v. Cont. Auto Supply, Inc.,** 39 F. (2d) 683, in addition to the **Thompson v. Hubbard case, supra.**

The Court made twenty-three separate findings each of which specifically negatived the defendant's contention re-

specting its product and sustained the plaintiff's view as to the validity of its claim of the unfair competitive methods by the defendant. It also made eight conclusions of law respecting the plaintiff's claim and nine conclusions respecting the defendant's counterclaim, all favorable to the plaintiff.

Subsequent to the making of said findings and conclusions the defendant submitted affidavits and asked for the modification of said findings and particularly in respect to defendant's registered trade-mark, Golden Bake, the substance of which objectionable findings were, that defendant has not been associated with Golden Bake pancake flour except to the minimum extent required by law and the public does not know or recognize Golden Bake, to have been the product of the defendant company; that it never advertised pancake flour under the name of Golden Bake, and enjoyed no goodwill in the mind of the public. It also found that Golden Bake was not sold in competition with plaintiff's products and that it was discontinued in the latter part of 1942, prior to the introduction of plaintiff's product, Golden Soy.

We quote from two of the Court's conclusions on defendant's counterclaim:

> "1. Defendant's trade-mark, Golden Bake for pancake flour, is a descriptive trade-mark and its registration under the Trade Mark Act of 1905 is invalid.
>
> "3. There has never been any goodwill associated with the business of defendant, Pillsbury Flour Mills Company, in its product, Golden Bake."

We also quote the following conclusions of law respecting plaintiff's trade-mark and copyright:

> "3. Plaintiff, Soy Food Mills, Inc., is the possessor of a valuable goodwill in and to its trade-marks, Golden Soy, Golden wheat-soy Mix, in and to the original dress and style of the carton labels under which its pancake flour product is sold and in and to the business which it has established in this product.
>
> "6. Plaintiff's label copyright registration No. 21789 is a good and valid label copyright and has been infringed by the defendant."

The court made four findings which read as follows:

> "11. The manufacture, offering for sale, and sale of Golden Bake was discontinued in the latter part of 1942 prior to the introduction on a substantial basis of plaintiff's product, Golden Soy.

"15. Plaintiff's Golden Soy and Golden wheat-soy Mix and defendant's Wheat-Soy-Rice and Golden Bake Mix have been and are being offered for sale and sold to the public as specialty products having improved characteristics over ordinary pancake flour.

"18. There is no evidence that anyone has been confused or deceived by any resemblance between the trademark or package dress and style of defendant's Golden Bake and plaintiff's Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins.

"22. Defendant is the owner of label registrations Nos. 48005, 52258, 52874, 53922, 42180, KK 8635 and KK 22293 for its Sno-Sheen, Minitmix, Golden Bake and Golden Bake Mix labels. None of said registrations has been infringed by plaintiff's Golden Soy, Golden wheat-soy Mix or Golden Mix for muffins labels or any of them."

[After their entry the Court heard argument and ordered each one stricken. It also struck its previously entered conclusions of law Nos. 4 and 5, which read:

"4. Defendant, Pillsbury Flour Mills Company, has been guilty of unfair competition in creating a state of public confusion and deception between its product, Golden Bake Mix, and plaintiff's products, Golden Soy and Golden wheat-soy Mix, and in passing off its product as that of plaintiff.

"5. Defendant's conduct has been deliberate and with knowledge of plaintiff's rights."] (5)

It did not, however, strike either conclusions of law No. 1 or No. 3 which it entered on defendant's counterclaim.

Defendant argues that these modifications and changes in the findings were made necessary because of the total absence of evidence to support them. [Plaintiff, however, contends that though the finding was stricken respecting Golden Bake, the Court did not change certain conclusions which were based on the said findings before they were stricken or changed. This the defendant contends was an oversight on the part of the Court. In other words, in striking out the findings the Court overlooked the fact that it had inserted conclusions inconsistent with its action striking the findings.

We are satisfied that where a finding is stricken when the court's attention is directed specifically to it, the retention of a conclusion based thereon, was an oversight or an error. The conclusion must be ignored unless other findings support it.] (5).

Comment (5). There is absolutely no mistake in the red underlined portions of the **last two paragraphs above** and the **meaning thereof** makes perfectly apparent that the previous red, underlined portions as well as the quoting of Findings (15), (18) and (22), constituted **merely an inadvertence on the part of the Court's "copyist."** The Court and Senior Judge Evans, who wrote the decision, intended the correct Findings (15), (18) and 22 under heading of Bill of Complaint, and the correct Conclusions (4) and (5) under the heading of Defendant's Counterclaim. This is very apparent because the Court stated directly after the wrong Conclusions were quoted: "It did not, however, strike either Conclusions of Law (1) or (3) which it entered on **Defendant's Counterclaim.**

The point is that the last two paragraphs of the Decision red lined, made perfect sense when read with the Findings intended by Judge Evans (11), (15), (18) and (22) under "Bill of Complaint" but are not applicable to the wrong Findings inadvertently put in by the Court's copyist. The inadvertency mentioned constitutes the only mistake of note throughout the entire Decision. This matter is fully covered on a section of "Argument," herein.

Two questions, both of which might well be said to be vexatious, intrude themselves into our consideration of the case: (a) why did plaintiff adopt the word, Golden, and simulate defendant's use of the same word in the trade-mark "Golden Bake"? We have found no satisfactory reason. [Defendant had been using its trade-mark for six years. It was duly registered.] (6) It could not fairly be said to be descriptive of the product, although the pancake may suggest the appropriateness of the word, golden. If descriptive, it would be equally offensive and objectionable, in plaintiff's as in defendant's name. Its prominence and location are the same in plaintiff's as in defendant's trade-mark.

Comment (6). This statement of the Court is absolutely correct (see Exh. B, R. 773, TM registration certificate for GOLDEN BAKE issued Oct. 29, 1935). It makes not a whit of difference that Respondent started in using the trade-mark for pancake flour as well as ordinary wheat flour, both contain mainly flour from wheat. There is not an iota of testimony in the entire record to refute Pillsbury's executives Files, Parsons, Bowman and Gibbs, who personally introduced and sold the original GOLDEN BAKE, knew of its sales, compiled memoranda from records, unless it could be said that the self-serving statement of Petitioner's president, Mr. Thomas, that he couldn't find packages of GOLDEN BAKE, had effect.

(b) The other query arises out of defendant's use of the word, Mix. Why did it use this word? [It offers an excuse which is not unreasonable. It points to the action of the Millers Association following the ruling of the U. S. Food and Drug Administration. It distinguished the product more specifically from a flour made up entirely of wheat. Moreover, in two prior instances, one of which appeared as early as 1933, it used the word, Mix, on its cartons.] (7)

It is sufficient to observe that if the term, Golden Bake, is an invalid trade-mark because it is purely descriptive, the same applies with equal effect to [plaintiff's copyright "Golden wheat-soy Mix"]. (8)

[Golden Bake was the trade-mark name which defendant selected and registered in October, 1935. It was the name used continuously thereafter. It applied to pancake flour which contained soy bean flour or to any other ingredient so used. As to this the evidence is conclusive.] (9)

Defendant, however, changed the name it used on the cover of the carton containing its pancake flour, in 1943, by adding the word, Mix. The words which plaintiff argues infringes [its label copyright, "Golden wheat-soy Mix"] (10) were "Golden Bake Mix."

Comment (8). Very obviously, the term "plaintiff's trade-mark" rather than "plaintiff's copyright" should have been used but very obviously, this slight inadvertence had no effect in directing the decision of the C. C. A.

Comment (9). The significance is entirely correct. In other words, Respondent's use and registration of GOLDEN BAKE established it for any pancake flour whether it contained a small amount of soy bean ingredient or not. Petitioner's pancake flour, admittedly, contained a very large percentage of wheat flour.

Comment (10). This was substantially the argument of Plaintiff-Petitioner, although Petitioner's label copyright under the law, had nothing whatsoever to do with obtaining statutory rights on the title or trade-mark GOLDEN wheat-soy MIX.

[Plaintiff contends that the addition of the word, Mix, occurred as a result of action taken by the United States Food and Drug Administration, which in 1941, gave standards of identity for wheat flour and related products. It, however, did not include in its order any definition of pancake flour. As a result, the mills of the United States, making flour, concluded that when pancake flour with another ingredient like soybean

flour added, was made and sold there should be added the word, Mix, to distinguish it from straight flour. This action was taken by the millers belonging to the Millers National Federation of the United States in December, 1943. Defendant added the word, Mix, shortly thereafter.] (11)

Comment (7) and (11). The substance of these two red underlined portions and significance thereof, is entirely correct and consistent with the record. The action of the United States Food and Drug Administration, giving new standards of identity for "flours" including wheat flour and related products, was identified in Respondent's Main Brief, before the C. C. A. (pp. 36 and 72). The official citation of this order identified was, Fed. Register, Vol. 6, No. 103—May 27, 1941, title 21, pp. 2574 to 2584. The C. C. A. apparently considered this official record and saw that it contained no standard for the previously used "pancake flour."

Respondent's witness Files testified that where several ingredients were blended with wheat flour, for several years millers had used the term "mix" and that he had heard about the new standards of identity but was not well posted thereon (R. 377).

Merely for the purpose of showing how millers had already acted on the new standards of identity of U. S. Food and Drug Adm., the C. C. A. and District Court were asked to take judicial notice of the official publication of Millers National Federation, which explained previous actions of the millers as a result of the change by U. S. Food and Drug Adm. Petitioner's comment on this subject, in its Appendix C, is not supported by the exhibits or record.

With this preliminary statement of facts we now take up, in the order of the decree, the various provisions so far as said decree runs against the defendant.

(a) The Court in said decree first restrained defendant from selling to the public a pancake or waffle or muffin flour blend under a trade-mark, Golden Bake Mix, or to use any other trade-mark which is a colorable imitation of or a close similitude to plaintiff's copyright, Golden wheat-soy Mix, and trade-mark, Golden Mix.

We are of the opinion that on the showing made, this part of the decree must fall for several reasons. (a) The words, Golden Bake Mix, must be read in connection with the word, "Pillsbury's", appearing in large letters on the top line, above the words, Golden Bake Mix.

A second reason for our conclusion is to be found in the fact that defendant had the right to use its valid trade-mark,

Golden Bake. The addition of the word, Pillsbury's, at the top of this trade-mark and the addition of the word, Mix, at the end of said trade-mark, were a legitimate extension of defendant's use of its said legal trade-mark and of its rights arising therefrom.

A third reason for this conclusion, is the fact that if there be confusion in the two carton covers, either in color effect or the use of words or both, said confusion is due to plaintiff's adoption of defendant's trade-mark with which it was in alleged confusing competition as to the colors, because plaintiff took defendant's prior use of blue and yellow background and built thereon. We are not prepared to give defendant any domination over a competitor through its use of these two colors—or in their position on the carton cover. Yet, it is clear if we were to give to either party any dominance over the other, we would be compelled to give defendant the preference because of its prior use.

Finally, as to the use of the word, Mix, which was used by plaintiff in its Exhibit 16 and Exhibit 11, and which appeared on the market on its products in June, 1943, and in August, 1943, defendant has this to say (and we accept it). [It followed the ruling of the Pure Food and Drug Administration on sales of flour, and the action of the Millers Association based thereon. Moreover, defendant caused hundreds of thousands of test packages to be distributed throughout the country to ascertain the public's reaction to its product. This was before either of Plaintiff's Exhibits 16 or 11 appeared. In other words, defendant was the first to use the word, Mix.] (12) These packages appeared in February, 1943. The word, Mix, also appeared ten years previous, on defendant's product, "Pillsbury's Minitmix."

Comment (12). The substance is entirely correct. Respondent's MINITMIX, a biscuit flour preparation with recipes for cakes and other products was established in 1933; trade-mark registered and the label registered as copyright subject matter (Exh. G, R. 778). It was a nationally advertised product through these years and large sums were spent promoting its sale (R. 298). Respondent's test product WHEAT-SOY-RICE mix was distributed in the amount stated by the C.C.A. and such distribution (consumer and market test) was made in February and March, 1943, before either of Plaintiff's Exhibits 11 or 16 appeared.

(b) The decree also enjoined defendant from selling pancake flour containing a soybean ingredient packaged in a container the exterior of which has a yellow, blue, white dress and style so arranged as to resemble the dress and style of colors on plaintiff's Golden wheat-soy Mix package and from otherwise unfairly competing with plaintiff in the dress and style of plaintiff's package.

An examination of the cartons leaves us entirely cold to the argument that there was unfair competition manifested by defendant's dress as against the plaintiff's dress. There are so many exhibits showing varieties of colors and locations of colors on the cartons that it is quite impossible to reproduce them all. It is sufficient to say on this issue of unfair competitive practices, based on color and designs, that on the top of defendant's carton, the word, Pillsbury's, was printed in a color different from the words, Golden Bake Mix. The word, Pillsbury's, has a yellow background, and the type is large and its position makes it likely to catch the eye of the customer. The second color across the side of the carton is blue. On this blue background appear the words, Golden Bake Mix. The letters of the word, Mix, are smaller than those used in the words, Golden Bake. On the face of this carton, near the bottom, are written the words, "For Pancakes, Waffles, Muffins."

[From 1935 to date of this litigation, defendant used a blue and yellow background for its trade-mark or trade-name. It did not materially change the relative position of this background coloring until 1943] when it used yellow at the top across the side of the carton. (13) Upon it was printed the word, "Pillsbury's." Then there was a large blue background below the yellow. Below the yellow and about two-thirds of the way down, the background was yellow.

Plaintiff's carton cover colors are primarily blue and yellow. At the top of the carton are printed the words, Golden wheat-soy Mix on a blue background and below the yellow background there is another, a blue background, containing the words, "For Griddle Cakes, Waffles."

The word, Golden, constitutes one line. It is in bold, large print. The words, wheat-soy, are very small. But the word, Mix, on the line below the line carrying the words, "wheat-soy," is in large letters—as large as the letters in the word, Golden.

Between the two blue backgrounds is a circular red col-

ored seal upon which are written the words, "The Soy Bean Taste Sensation." These words were not used by defendant on its carton. Nor is there any seal-like circle. Defendant does have a thin bar of red across the lower yellow background on which appear the words, "with 20% soy."

The words printed on the carton are as important as selection of the colors or the color order.

Comment (13). The date 1935 was the date of establishment of the trade-mark but is not the correct date for the blue and yellow background. The correct date is 1940, still almost three years before the advent in business of Petitioner's predecessor. Certainly, this inadvertence has no materiality.

In attempting to appraise properly the situation disclosed by this record, we are impressed by the fact that unfair competition and trade-mark and copyright infringements do, in the last analysis, involve very similar issues. They are phases of over-zealous competition or they evidence a lack of ethical ideals in business transactions which call for judicial correction. In fact, it has been declared that trade-mark law is but a part of the broader field of the law of unfair competition.

It is not unusual in the course of a trial where much feeling and heat are engendered, and the disputes are irreconcilable that a few salient and vital facts are clearly established, and they point the way to the correct answer to the charges involved. The present suit is no exception to the rule. The facts which are somewhat determinative and which are conclusively established are:

(a) The plaintiff out of the numberless words it could have chosen, selected the word, Golden, which it found already appropriated [in this identical field] (14), by the defendant. [The Patent Office gave plaintiff notice that defendant, years before, had selected as the first word of its registered trade-mark, the word, Golden.] That the word, Golden, as one of a trade-mark name is not merely descriptive, has been held in many courts. (Fairbanks Co. v. Luckel Soap Co., 102 F. 327; Fairbanks Co. v. Ball Mfg. Co., 77 F. 869; Fla. Fruit Canners, Inc., v. Atlantic Sea Food Packers, 69 U. S. P. Q. 177; Lowney Co. v. Chandler Co., 12 F. (2d) 189; California Packing Corp. v. Halferty, 295 F. 229; Pontefact v. Isenberger, 106 F. 499.)

We have been unable to find any satisfactory explanation of plaintiff's selection of this word. At least its choice is more consistent with a desire to get into volume business regardless of the methods adopted, than it evidences a good faith effort to select a distinctive name under which to sell its products.

Comment (14). The red lined statements are absolutely correct. The "identical field" is pancake mixes or pancake flours. Here, Petitioner is against seeking to quibble over a supposed distinction between pancake mixes containing a little soy and pancake mixes containing no soy. The Trial Court committed glaring error in making a distinction in the classification of goods, contrary, as has been shown in the preceding brief, to the recognized law on the subject.

(b) The other striking fact which refutes plaintiff's allegations appearing in its sworn complaint that defendant was making an inferior product and palming it off as plaintiff's is defendant's conspicuous use of the word, "Pillsbury's" at the top of its carton. Its use not only completely refuted the charge that it was trying to sell its products as plaintiff's but it was most persuasive evidence that its purpose was just the opposite. It leaves no room for doubt as to defendant's motives and its good faith.

(c) In selecting its colors, though deviating somewhat in their order, plaintiff chose to make use of two colors for use as the background of its carton advertisements. One major color was blue. The other was yellow. On these two colors it printed its copyright words. It began with the word, Golden, which was carried in larger type.

In selecting blue and yellow, plaintiff must have known that such were the long used colors of defendant. Not that defendant had a monopoly on their use, but if confusion were to result, it was apparent that it must come from the use of the word, Golden, and the use of the similar colors, yellow and blue. Both practices must be charged to plaintiff.

Without greater elaboration of our views we state our conclusions which are:

(1) We are convinced that there was no unfair competition by either party.

(2) We need not determine the validity of defendant's trade-mark, Golden Bake, because we do not believe it was

infringed by plaintiff's carton containing the words, Golden wheat-soy Mix.

(3) The coloring of the cartons as well as the other words appearing thereon do not justify a finding of unfair competition by either party.

(4) Defendant's carton containing the words, "Pillsbury's" "Golden Bake Mix" does not infringe plaintiff's copyright, "Golden wheat-soy Mix."

(5) The coloring of the cover of the cartons, together with the words appearing thereon, do not make out a case of infringement by defendant of plaintiff's copyright.

The decree of the district court must be, and is, reversed, with directions to dismiss the plaintiff's complaint and also the defendant's counterclaim.

A true Copy:

Teste: _____

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

APPENDIX C

DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

SHOWING AMENDMENTS

COURT'S FINDINGS OF FACT

Bill of Complaint

1. Plaintiff's soy pancake flour product, Golden Soy, was first introduced in a blue and yellow carton of original design in November, 1942.

2. Golden Soy enjoyed an immediate and substantial public acceptance in the localities in which it was introduced, which localities included the principal metropolitan areas in the east and middle western sections of the country.

3. Plaintiff, Soy Food Mills, Inc., expended in excess of $200,000.00 in advertising Golden Soy and Golden wheat soy Mix during the year 1943 and the year 1944, up to September 25.

4. Defendant, Pillsbury Flour Mills Company, introduced Wheat-Soy-Rice, a soy pancake flour, directly competitive to plaintiff's product, Golden Soy, in February, 1943. Said product was sold in interstate commerce and distributed in eight particularly selected cities.

5. At the time of the introduction of Golden Soy and continuously from November, 1942, until the introduction of defendant's product, Golden Bake Mix, in September, 1943, there was no confusion of trade-mark and/or package between Golden Soy, Golden wheat-soy Mix, and any other competitive product of the defendant then on the market, including defendant's products, Golden Bake and Wheat-Soy-Rice.

6. In May, 1943, plaintiff redesigned the dress and style of its Golden Soy carton and adopted the redesigned dress and

style and the trade-mark Golden wheat-soy Mix for the same product previously sold as Golden Soy. This action was taken following a decree entered by Judge Barnes on May 21, 1943, in case No. 43 C 274, which was an action by the United States Food and Drug Administration against Soy Food Mills, Inc.

7. Golden wheat-soy Mix also enjoyed a substantial public acceptance from the date of its introduction until the date of the filing of the bill of complaint herein.

Amended by adding in line 2, after "acceptance," the following:

"in the principal metropolitan areas in the east and middle western sections of the country."

8. Plaintiff introduced its product, Golden Mix, for muffins in a carton of original design in June, 1943. This product is a preparation containing soy flour which is particularly adapted for muffins.

9. Defendant, Pillsbury Flour Mills Company, first introduced Golden Bake Mix commercially in September, 1943. This product is the same product as that sold previously as Wheat-Soy-Rice.

10. Defendant's adoption of the Golden Bake Mix carton and trade-mark was deliberate and with knowledge of plaintiff's products, Golden Soy and Golden wheat-soy Mix.

11. There is no close resemblance between defendant's Golden Bake label and the defendant's Golden Bake Mix label except that both contain the words Golden Bake and both utilize the colors blue, yellow and white. In the case of Golden Bake Mix, the color red is prominently employed.

12. The dress and style of defendant's Golden Bake Mix carton and label more closely approximate plaintiff's Golden Soy and Golden wheat-soy Mix cartons and labels than is in any way justified by defendant's past use of the trade-mark Golden Bake and blue and yellow color combinations for Golden Bake and other products.

13. The Golden Bake Mix label adopted by defendant in September, 1943, containing illustrations of pancake and waffle dishes on the reverse side of the box closely resembles the label on plaintiff's Golden wheat-soy Mix carton. ~~Evidence shows that this is the first time that Pillsbury Flour Mills Company~~

~~used this type of illustration on their food product cartons.~~

Last sentence only **stricken** by Court's amendment.

14. In its advertising and sale of Golden Bake Mix defendant has utilized the slogans, "The New Soy Taste Sensation" and "The New Soy Sensation", in close imitation of plaintiff's trade-mark slogan, "The Soy Bean Taste Sensation", used on all of plaintiff's packages and all or practically all of plaintiff's advertising.

15. ~~Prior to its introduction of Golden Bake Mix in September, 1943, defendant had never previously used a label color scheme comprising the colors, blue, yellow, red and white.~~

Stricken by Court's amendment.

16. Prior to its introduction of Wheat-Soy-Rice in February, 1943, and Golden Bake Mix in September, 1943, defendant had never previously used the designation "Mix" to refer to a prepared pancake preparation.

17. Deceptive similarity and confusion is admitted by both parties between the packages of defendant's Golden Bake Mix and plaintiff's packages of Golden Soy and Golden wheat-soy Mix.

18. ~~Plaintiff has proved that Golden Bake Mix has been and is being passed off as plaintiff's product.~~

Stricken by Court's amendment.

19. Defendant has been guilty of unfair competition toward plaintiff in the advertisement, offering for sale and sale of its product Golden Bake Mix, continuously from the date of its introduction to the present day.

20. Plaintiff has suffered substantial damages to its business and good will as the result of defendant's unfair competition.

21. The exact amount of the recovery which plaintiff is entitled to receive from defendant should properly be determined by a master appointed for that purpose by this Court.

22. ~~Plaintiff is the owner of label copyright registration No. 21,780 for its Golden wheat-soy Mix label. This copyright registration has been and is being infringed by defendant's Golden Bake Mix label.~~

Stricken by Court's amendment.

23. There is no evidence to support the defendant's contention that the plaintiff was guilty of unclean hands prior to and at the time of the filing of the bill of complaint.

FINDINGS OF FACT

Counterclaim

1. Defendant is the owner of the trade-mark, Golden Bake, registered in the United States Patent Office for wheat flour on October 29, 1935, Registration No. 329,356. This trade-mark has not been infringed by plaintiff's trade-marks, Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins.

2. For several years prior to January, 1943, defendant, Pillsbury Flour Mills Company, manufactured and sold an ordinary pancake flour not containing soy flour under the trade-mark, Golden Bake.

3. Golden Bake was an associate or secondary brand which was sold for defendant's convenience where particular circumstances made such sales appear advisable.

4. Golden Bake is a trade-mark which is descriptive of the ingredients, qualities or characteristics of the products with which it is utilized.

5. ~~Food package products utilizing the colors blue and yellow have been in wide and general use by others long prior to any use of these colors by defendant.~~

Amended by substituting the following:

5. Pancake flour package products utilizing the colors blue and yellow have been in general use by others prior to any use of these colors by defendant.

6. ~~The use by the defendant of the colors blue and yellow on other products has not been extensive and is insufficient to cause the public to associate this color combination with the defendant.~~

Stricken by amendment, substituting the following:

6. Defendant's use of contiguous blue and yellow panels on Pillsbury's and Snosheen cake flour with and without red stripes or markings and on products other than Golden Bake

pancake flour has been substantial and extensive for many years prior to plaintiff's advent in business.

7. The name of the defendant has been associated with Golden Bake pancake flour only to the minimum extent required by law and there is no evidence that the public recognizes or knows Golden Bake to be or to have been a product of the defendant company.

8. Golden Bake was never advertised.

9. There is no evidence that the product, Golden Bake, enjoys or has enjoyed in the minds of the public, wholesalers or jobbers any degree of good will.

10. There is no evidence that Golden Bake was ever sold in competition with any of plaintiff's products.

11. ~~The manufacture, offering for sale, and sale of Golden Bake was discontinued in the latter part of 1942 prior to the introduction on a substantial basis, of plaintiff's product, Golden Soy.~~

Stricken by Court's amendment.

12. The defendant virtually discontinued the manufacture and sale of Golden Bake at the time it introduced the competitive product, Golden Bake Mix.

13. The evidence is not convincing that defendant's substantial discontinuance of the manufacture and sale of Golden Bake was due to a shortage of ingredients.

14. Plaintiff has exercised reasonable care to distinguish its Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins, trade-marks, cartons and labels from those of defendant's competitive products on the market at the time of their adoption, including defendant's Golden Bake.

15. Plaintiff's Golden Soy and Golden wheat-soy Mix and defendant's Wheat-Soy-Rice and Golden Bake Mix have been and are being offered for sale and sold to the public as specialty products having improved characteristics over ordinary pancake flour.

16. Plaintiff has wholly failed to sustain the charge of its complaint that "defendant employs in its Golden Bake Mix a second run wheat flour and also employs as a filler a substantial

amount of rice flour which is a lower cost ingredient" and "the soya grits which is the soya bean ingredient used by the defendant although possessing some of the advantages of soy flake flour are coarse, unappetizing," etc.

17. Plaintiff's Golden Soy and Golden wheat-soy Mix and defendant's Wheat-Soy-Rice and Golden Bake Mix have been and are being sold to the public at a price above that at which ordinary pancake flours not containing soy flours are sold, and at twice the sale price of Golden Bake.

18. There is no evidence that anyone has been confused or deceived by any resemblance between the trade-mark or package dress and style of defendant's Golden Bake and plaintiff's Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins.

19. There is no evidence that any of plaintiff's products have been passed off as defendant's Golden Bake.

20. There is no evidence that defendant has suffered any damage in its business and good will in Golden Bake by reason of the sale by plaintiff of Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins.

21. Plaintiff has not been guilty of unfair competition toward defendant in its advertisement, offering for sale and sale of its products, Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins.

22. Defendant is the owner of label Registrations Nos. 48,005, 52,258, 52,874, 53,922, 42,180, KK 8635 and KK 22,293 for its Snosheen, Minitmix, Golden Bake and Golden Bake Mix labels. None of said registrations has been infringed by plaintiff's Golden Soy, Golden wheat-soy Mix or Golden Mix for muffins labels or any of them.

23. The defendant has been guilty of inequitable conduct toward the plaintiff prior to and at the time of the filing of its counterclaim, which inequitable conduct was directly associated with the subject matter of its alleged cause of action. Said inequitable conduct consisted of the change of its carton label and trade-mark for a soy pancake flour from the non-confusing Wheat-Soy-Rice to the confusing Golden Bake Mix, with knowledge of plaintiff's products and rights.

COURT'S CONCLUSIONS OF LAW

Bill of Complaint

1. The plaintiff, Soy Food Mills, Inc., is a corporation organized and existing under the laws of the State of Illinois and has its principal place of business in the City of Chicago, State of Illinois.

2. The defendant and counterclaimant, Pillsbury Flour Mills Company, is a corporation organized and existing under the laws of the State of Delaware and has its principal place of business in the City of Minneapolis, State of Minnesota.

3. Plaintiff, Soy Food Mills, Inc., is the possessor of a valuable good will in and to its trade-marks Golden Soy, Golden wheat-soy Mix, in and to the original dress and style of the carton labels under which its pancake flour product is sold and in and to the business which it has established in this product.

4. Defendant, Pillsbury Flour Mills Company, has been guilty of unfair competition in creating a state of public confusion and deception between its product Golden Bake Mix and plaintiff's product Golden Soy and Golden wheat-soy Mix and in passing off its product as that of plaintiff.

5. Defendant's conduct has been deliberate and with knowledge of plaintiff's rights.

6. Plaintiff's label copyright Registration No. 21,789 is a good and valid label copyright and has been infringed by the defendant.

7. Plaintiff has not been guilty of unclean hands prior to or at the time of the filing of the bill of complaint herein.

8. Plaintiff, Soy Food Mills, Inc., is entitled to the injunctive relief, accounting for profits and damages and costs as prayed for in the bill of complaint.

CONCLUSIONS OF LAW

Counterclaim

1. Defendant's trade-mark Golden Bake for pancake flour is a descriptive trade-mark and its registration under the Trade-Mark Act of 1905 is invalid.

2. Plaintiff, Soy Food Mills, Inc., has not infringed defendant's trade-mark Golden Bake, by the offering for sale and sale of Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins.

3. There has never been any good will associated with the business of defendant, Pillsbury Flour Mills Company, in its product, Golden Bake.

4. ~~The defendant, Pillsbury Flour Mills Company, abandoned its business in the product Golden Bake in the latter part of 1942 and abandoned the use of the trade-mark and package in which the product had been packed.~~

Stricken by Court's amendment.

5. ~~The defendant, Pillsbury Flour Mills Company, is not possessed of exclusive proprietary rights in the dress and style of packages for food products utilizing the colors blue and yellow.~~

Amended by substituting the following:

5. Defendant is not possessed of any exclusive proprietary rights in packages for soy containing pancake flour relating to the colors blue and yellow.

6. The plaintiff, Soy Food Mills, Inc., in the sale of its products, Golden Soy, Golden wheat-soy Mix and Golden Mix for muffins has not been guilty of unfair competition toward defendant.

7. The defendant's label copyright Registration Nos. 48,005, 52,258, 52,874, 53,922, 42,180, KK 8635 and KK 22,293 are not infringed by the plaintiff.

8. The defendant has been guilty of inequitable conduct toward plaintiff prior to the filing of the bill of complaint herein which precludes it from asserting any claim against plaintiff.

9. The counterclaim and supplemental counterclaim should be dismissed at the defendant's costs.